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# In the Supreme Court of the United States

MASSEY ENERGY COMPANY AND CENTRAL WEST VIRGINIA ENERGY COMPANY,

*Petitioners,*

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON, LLC,

*Respondents.*

**On Petition for a Writ of Certiorari to The Supreme Court of Appeals of West Virginia**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment requires States to afford litigants at least one appeal as of right to review judgments awarding substantial compensatory and/or punitive damages.

2. Whether the Due Process Clause of the Fourteenth Amendment prohibits a court from deciding a case with the participation of a judge who has publicly and harshly attacked one of the parties over an extended period.

## RULE 29.6 STATEMENT

Petitioner Massey Energy Company, a publicly traded company, has no parent corporation. Fidelity Management & Research owns 10% or more of its stock. Petitioner Central West Virginia Energy Company is a subsidiary of Massey Energy Company, which owns more than 10% of its stock. No other publicly traded corporation owns 10% or more of Central West Virginia Energy's stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners, Massey Energy Company ("Massey") and Central West Virginia Energy Company ("CWVEC"), respectfully petition for a writ of certiorari to review the orders of the Supreme Court of Appeals of West Virginia denying their petitions for appeal.[1]

## OPINIONS BELOW

The orders of the Supreme Court of Appeals denying petitioners' petitions for appeal (App., *infra*, 1a-4a) are unreported. The orders of Justice Starcher denying petitioners' motion and renewed motion for recusal (*id.* at 5a-18a) are unreported. The relevant orders of the circuit court (*id.* at 19a-34a) are unreported.

## JURISDICTION

The orders of the Supreme Court of Appeals denying the petitions for appeal were entered on May 22, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a). Because the constitutionality of West Virginia's failure to afford litigants at least one appeal as of right is drawn into question by this petition, 28 U.S.C. § 2403(b) may apply. Pursuant to this Court's Rule 29.4(c), petitioners have therefore served this petition on the Attorney General of West Virginia.

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[1] Petitioners are simultaneously filing a separate petition for a writ of certiorari (the "Circuit Court Petition") seeking review of the underlying orders of the Circuit Court of Brooke County, the highest court in West Virginia to decide petitioners' substantive claims on the merits.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the Appendix. App., *infra*, 35a-37a.

## STATEMENT

A West Virginia jury ordered petitioners to pay respondents $119 in compensatory damages and $100 million in punitive damages. The trial court upheld the award and added $24 million in prejudgment interest. Petitioners filed petitions for appeal in the West Virginia Supreme Court of Appeals—the State has no intermediate appellate court and the jurisdiction of the Supreme Court of Appeals is discretionary—but the court refused to review the case. As things now stand, therefore, petitioners must pay a damages award of nearly a quarter of a billion dollars—the Nation's seventh largest verdict in 2007—that was reviewed by a grand total of one judge. That is an intolerable result. It is also unconstitutional.

This Court's decisions establish a due-process right to appellate review of punitive-damages awards. The Court has held that appellate review of punitive awards must be *de novo*, and it has made clear that such review is a constitutional requirement. If the Constitution prohibits deferential review of punitive awards, it necessarily prohibits States from affording *no* appellate review of punitive awards. Yet that is precisely what occurred both here and in other cases in West Virginia, the only State in which there is no right to appellate review of a punitive award exceeding $350,000.

The Supreme Court of Appeals' denial of review violates due process for another reason: A judge who

participated in the consideration and disposition of the petitions was "actual[ly] bias[ed]" against petitioners. That judge—Justice Starcher—has, over the course of several years, attacked Massey and its chairman in terms so harsh as virtually to defy belief. He has said, for example, that Massey has attempted to "purchase" and "own" a seat on the Supreme Court of Appeals; that Massey's chairman is "stupid" and a "clown"; that the conduct of Massey and its chairman are "obscene," "disgusting," "highly offen[sive]," "pernicious," "evil," and "cancer[ous]"; and that Massey and its chairman are comparable to violent criminals. If those statements do not amount to actual bias requiring recusal as a matter of due process, it is hard to conceive of any case in which antagonism towards a party would require a judge's recusal. In fact, courts—including this one—have ordered recusal for far less. Indeed, in refusing to recuse himself, Justice Starcher all but dared this Court to grant review, stating that, if his decision to participate "can be argued to create due process problems of constitutional dimensions," then "so be it."

It is bad enough that petitioners received no appellate review of a nine-figure damages award and that one of the judges who participated in the decision to deny review has a demonstrated and acknowledged animus towards Massey. But the denial of review is all the more problematic because the damages of which petitioners seek review were awarded in a State—West Virginia—that has a well-deserved reputation as the most pro-plaintiff and anti-business jurisdiction in the Nation. If appellate review of a substantial punitive award, by an unbiased tribunal, is constitutionally necessary in every State, as this petition demonstrates, it is particularly

necessary in West Virginia, where staggeringly large jury verdicts are unfortunately all too common. This Court should grant certiorari to make clear that West Virginia—like every other State—must comply with these two basic requirements of due process.

### A. Appellate Review in West Virginia

Unlike all other States but one, West Virginia does not afford litigants an appeal as of right. The State has no intermediate appellate court, and review by the Supreme Court of Appeals is entirely discretionary. The losing party in a West Virginia trial court must file a *petition* for appeal. W. VA. R. APP. P. 3, 5, 7; see W. VA. CONST. art. 8, § 4. If the petition is denied, the trial court's decision will go unreviewed, unless the party successfully petitions for a writ of certiorari in this Court (which, even in that event, would lack the power to correct any errors of state law).

The Supreme Court of Appeals exercises absolute discretion in deciding whether to grant or deny a petition for appeal, and it makes the decision without the full record. W. VA. R. APP. P. 7, 9; see *Billotti* v. *Dodrill*, 394 S.E.2d 32, 37 (W. Va. 1990). A petition for appeal thus resembles a petition for a writ of certiorari in this Court, except that a certiorari petition normally follows appellate review as of right in a federal or state appellate court. Unlike a grant of certiorari in this Court, moreover, a grant of leave to appeal to the Supreme Court of Appeals ordinarily requires the vote of a majority of the court's five justices. See ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 14 (2d ed. 1989).

While a party may request an opportunity to present a petition for appeal orally, the Supreme

Court of Appeals may deny that request in the exercise of its discretion. W. VA. R. APP. P. 5(a). Such a request is not regularly granted, and it was not granted here. Only if a majority of the justices vote to allow an appeal will the case be docketed, the record assembled, the appeal fully briefed on the merits, and oral argument heard. W. VA. R. APP. P. 7-12.

West Virginia stands nearly alone among the 50 States. In 39 States, as well as the federal system, parties have the right to appeal an adverse judgment to an intermediate appellate court. See App., *infra*, 38a-45a. Nine other states and the District of Columbia do not have an intermediate appellate court, but afford parties an appeal as of right to the State's highest court. See *ibid.* Only West Virginia and its "mother state"—Virginia—deny litigants at least one appeal as of right.

### B. Justice Starcher's Animus Towards Massey

One member of the Supreme Court of Appeals, Justice Larry Starcher, harbors a deep-seated animus towards Massey and the company's chairman, CEO, and president, Don L. Blankenship. The existence of the animus has been demonstrated beyond any doubt by Justice Starcher himself, through a remarkable series of increasingly vitriolic statements—both judicial and extrajudicial—over the course of several years.

The statements began no later than 2002, when Justice Starcher told a group of high-school students that Massey was harming West Virginia because it reaped benefits from the State while offering nothing in return. Juliet A. Terry, *Justice's criticism of Massey angers high school students*, THE STATE J.

(WV), Jan. 3, 2003, at 9. In 2004, in connection with Mr. Blankenship's activities in the judicial-election campaign, Justice Starcher repeatedly accused Massey of attempting to "own the West Virginia Supreme Court." *E.g.*, Christian Giggenbach, *Benjamin: Child rapist probation a mistake*, THE REGISTER-HERALD, Oct. 22, 2004, at 7B. Addressing a convention of plaintiffs' lawyers several months later, Justice Starcher expressed a similar view, telling the audience that he was "highly offended" by Massey's "obscene" attempt to "purchase a seat on our Supreme Court." Remarks at Va. Trial Lawyers Ass'n Annual Convention (Apr. 2, 2005). That same year, in denying a motion for recusal filed by a Massey affiliate in another case, Justice Starcher acknowledged that he had "said that, in my opinion, Massey has not been a good corporate citizen." Letter to Clerk, *Marfork Coal Co. v. Director*, No. 051011, at 1 (W. Va. June 16, 2005).

Later in 2005, Justice Starcher was quoted as saying that Massey's chairman, Mr. Blankenship, "has no real concern or interest in the betterment of West Virginia" but was "simply on an egomaniac trip." Vicki Smith, *Blankenship marks Starcher for defeat*, THE CHARLESTON GAZETTE, Oct. 27, 2005, at 7A. In an interview with a local news station around the same time, Justice Starcher said that Mr. Blankenship was "stupid" and "doesn't know what he's talking about," and added that "I am certainly not afraid of him." Sarah K. Winn, *Massey chief 'stupid,' justice asserts*, SATURDAY GAZETTE MAIL, Oct. 29, 2005, at A1. In the same interview, Justice Starcher described Mr. Blankenship as an "outsider" and a "clown" who was "trying to buy influence like buying candy for children," conduct that Justice

Starcher said he found "disgusting." Tr. of WOWK News 13 Broadcast (Oct. 28, 2005, 11 p.m.).

### C. Proceedings in the Trial Court

The underlying dispute in this case, which is described in more detail in the Circuit Court Petition (at 3-8), concerns a 1993 requirements contract between petitioner CWVEC, a supplier of coal and indirect subsidiary of petitioner Massey, and respondent Wheeling Pittsburgh Steel Company ("Wheeling Pitt"), a manufacturer of steel. In 2004, CWVEC encountered severe labor, transportation, and climatic complications that affected its ability to meet its contractual obligations. It consequently invoked a number of *force majeure* clauses, which excused performance under the contract. Trial Tr. 491, 913, 2327-2329, 2345, 2365, 2377, 4420, 4452-4454.

In April 2005, Wheeling Pitt sued CWVEC for breach of contract in the Circuit Court of Brooke County, home to the Wheeling Pitt steel factory, where many of the county's residents work. Wheeling Pitt alleged that Massey had invoked the *force majeure* clauses in order to sell its coal to other buyers at a higher price. Compl. ¶ 2. Wheeling Pitt later amended its complaint, adding a claim for misrepresentation and a demand for punitive damages. Am. Compl. ¶¶ 134-39. The amended complaint added Massey as a defendant and respondent Mountain State Carbon, LLC, Wheeling Pitt's successor in interest, as a plaintiff. *Id.* ¶¶ 7, 9.

In July 2007, a jury returned a verdict in favor of respondents. It awarded a total of $219 million in damages—$119 million in compensatory damages for which Massey and CWVEC were jointly and severally liable and $100 million in punitive damages, of

which each petitioner was liable for half. Trial Tr. 5567-83.

The parties filed post-trial motions addressing, among other things, the award of punitive damages. After rejecting petitioners' challenges to the award, the court entered judgment for the full $219 million. It also tacked on $24 million in pre-judgment interest, calculated at the above-market statutory rate of 10 percent. In subsequent orders, the court summarily denied petitioners' motion for judgment as a matter of law or, in the alternative, a new trial with respect to the punitive award. App., *infra*, 19a-34a.

### D. Proceedings in the West Virginia Supreme Court of Appeals

1. Petitioners filed petitions for appeal in the West Virginia Supreme Court of Appeals. The petitions raised multiple assignments of error, among them that the trial court erred in allowing respondents to recast their breach-of-contract claim as a tort claim; that respondents did not prove each element of the misrepresentation claim; and that the trial court erroneously admitted several types of evidence, including expert testimony, evidence that had not been disclosed before trial, and evidence of alleged misconduct that was time-barred. Massey Am. Pet. for Appeal 20, 22-48, 65-74; CWVEC Am. Pet. for Appeal 12-31, 45-65. The petitions also challenged the constitutionality of the punitive award. Massey Am. Pet. for Appeal 49-65; CWVEC Am. Pet for Appeal 31-45. Massey argued that, "to guarantee the due process rights of the appellant," the court was obligated to undertake "a de novo determination" of whether a punitive award was justified and, if the court found that it was, "a de novo review" of

the size of the award. Massey Am. Pet. for Appeal 21.

Petitioners also filed a motion requesting that Justice Starcher recuse himself from participating in the case. The motion argued that recusal was necessary because Justice Starcher's "public, repeated, and derogatory statements," many of which were identified in the motion, "reveal a personal bias and deep-se[at]ed animosity against Massey." Joint Mot. to Recuse 1; see *id.* at 4-5. The motion pointed out that "[t]he underlying rationale for disqualification is based on principles of due process." *Id.* at 3.

In West Virginia, a motion to recuse is decided by the justice whose recusal is sought, W. VA. R. APP. P. 29(f), and Justice Starcher denied this motion in a short memorandum, App., *infra*, 6a-7a. Without disputing that he had made the statements Massey identified, Justice Starcher took the position that recusal was not required because he had no "financial interest in this case," did not "know any of the litigants," and did not have "personal knowledge of any disputed facts in the litigation." *Id.* at 7a.

2. At the time that Justice Starcher denied the motion for recusal, the West Virginia Supreme Court of Appeals had recently issued a decision in favor of a Massey affiliate in another case, *Caperton* v. *A.T. Massey Coal Co.*, No. 33350, 2007 W. Va. LEXIS 119 (Nov. 21, 2007). In that case, Justice Starcher had also denied a motion by the Massey affiliate requesting that he recuse himself. He elaborated on his reasons for doing so in an opinion dissenting from the decision on the merits. The opinion expressed the view that Justice Starcher was no more required to disqualify himself from cases in which Massey is a party than from cases involving murderers and wife

beaters, because, in his words, "I do decry murder and domestic violence and I speak out on it, and I also sit as a judge and hear cases involving people who are charged with those offenses." 2007 W. Va. LEXIS 119, at *106-*107 (Starcher, J., dissenting).

After the West Virginia Supreme Court of Appeals granted rehearing in *Caperton*, Justice Starcher changed his position and decided to recuse himself in that case. *A.T. Massey Coal Co.* v. *Caperton*, No. 33350 (Feb. 15, 2008), *available at* http://www.state.us/wvsca/press/caperton.pdf. Justice Starcher stated that he was recusing himself because there was "a reasonable appearance of impropriety." *Id.* at 2. He nevertheless continued to insist that he could "fairly judge" a case in which Massey was a party, in the same way that he could fairly judge "drunk drivers, spousal abuse, criminal behavior of an individual, certain reprehensible behavior of tobacco companies or the conduct of predatory lenders—behavior which I personally abhor, yet professionally pass judgment on regularly." *Id.* at 1-2. Justice Starcher also took the opportunity to state his belief that the conduct of Massey's chairman, Mr. Blankenship, had become "a pernicious and evil influence" on "the administration of justice" and had "created a cancer in the affairs of this Court." *Id.* at 3, 8-9.[2]

3. In light of Justice Starcher's recusal in *Caperton*, Massey renewed its recusal motion in this case.

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[2] On rehearing in *Caperton*, the court again ruled in favor of the Massey affiliate. *Caperton* v. *A.T. Massey Coal Co.*, No. 33350, 2008 W. Va. LEXIS 22 (W. Va. Apr. 3, 2008). A petition for a writ of certiorari in that case is pending. *Caperton* v. *A.T. Massey Coal Co.*, No. 08-22, filed July 2, 2008.

In response, Justice Starcher took the unusual steps of scheduling a hearing (which was eventually cancelled) and propounding interrogatories to Massey (which were eventually rescinded). See App., *infra*, 8a. Despite his decision to recuse himself in *Caperton*, however, Justice Starcher again declined to recuse himself here. *Id.* at 8a-18a.

In denying the motion, Justice Starcher acknowledged that he had "publicly criticized" Massey and its chairman; that he had a "publicly-stated low opinion" of Mr. Blankenship; and that he had previously described Mr. Blankenship as "stupid and a clown." App., *infra*, 16a. Justice Starcher also repeated his assertion that Mr. Blankenship had created a "cancer" in the court. *Id.* at 10a. And he again compared Massey and its chairman to violent criminals, arguing that, "while I strongly disapprove of rape, child molestation and murder, that doesn't mean I have to step aside in those cases." *Id.* at 16a.

Much of Justice Starcher's opinion was devoted to an attack on two other members of the court. The opinion discussed the fact that Chief Justice Maynard—who, unlike Justice Starcher, recused himself both in *Caperton* and in this case—had spent time with Mr. Blankenship, an old friend, while they were vacationing separately in the same part of Europe. App., *infra*, 10a-15a. The opinion also discussed the fact that Mr. Blankenship had supported Justice Benjamin, and opposed his opponent, in the 2004 judicial election and that Mr. Blankenship had done so through substantial financial contributions. *Id.* at 9a-10a, 17a-18a.

The thrust of the opinion was that Justice Starcher was refusing to recuse himself in this case only because Justice Benjamin declined to recuse

himself in *Caperton* after Justice Starcher had done so. *Id.* at 9a-10a, 16a-18a. Indeed, Justice Starcher explicitly stated that he would "step aside following the very moment that [Justice Benjamin] in this case does so." *Id.* at 17a-18a. Justice Starcher then concluded his opinion with the observation that, "[i]f my decision to participate in the instant case can be argued to create due process problems of constitutional dimensions, so be it." *Id.* at 18a.

4. The Supreme Court of Appeals subsequently denied petitioners' petitions for appeal, by a vote of five to zero. App., *infra*, 1a-4a. The orders issued by the court provided no explanation for the denial; each stated only that the court was "refus[ing] said petition for appeal." *Id.* at 1a, 3a. Justice Starcher participated in the consideration and disposition of both petitions.

## REASONS FOR GRANTING THE PETITION

The Supreme Court of Appeals' refusal to review the $243 million judgment against petitioners violated due process in two independent respects. First, a litigant has a right to appellate review of substantial awards, especially punitive exactions, and West Virginia did not afford any here. Second, a litigant has a right to unbiased decisionmakers, and Justice Starcher was manifestly biased against Massey. This Court should grant review on both of these exceptionally important issues.

## I. REVIEW IS WARRANTED TO DECIDE WHETHER DUE PROCESS REQUIRES A STATE TO AFFORD DEFENDANTS A RIGHT TO APPEAL SUBSTANTIAL JUDGMENTS, ESPECIALLY THOSE IMPOSING LARGE PUNITIVE EXACTIONS.

### A. The Supreme Court Of Appeals Violated Due Process By Refusing To Review The $243 Million Judgment In This Case.

A money judgment constitutes a deprivation by the State of a defendant's property. For that reason, the requirements of due process apply to the procedures employed in arriving at such a judgment. See, *e.g.*, *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1062-1063 (2007). And the logic of this Court's cases, especially in addressing the review of punitive damages, indicates that West Virginia's practice of refusing any appeal as of right, so far out of step with the rest of the Nation, violates due process.

1. In its decisions recognizing the constitutional limitations on punitive damages, this Court has consistently emphasized the critical role of appellate review. Indeed, those decisions compel the conclusion that appellate review of punitive awards is required as a matter of procedural due process.

a. In *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), the Court observed that, under "the traditional common-law approach," which the Court "more than once has approved," the amount of punitive damages "is initially determined by a jury" and the jury's determination "is then reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 15. In rejecting a due-process challenge to the punitive award in that case, the Court empha-

sized that, "[b]y its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion" and that "[t]his appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose." *Id.* at 20-21.

Two Terms later, in upholding a punitive award against a due-process challenge in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993), the plurality relied on the fact that the award was assessed by an impartial jury; that the award was reviewed and upheld by a trial judge who had heard the evidence; and that it "was affirmed by a unanimous decision of the State Supreme court of Appeals." *Id.* at 457 (opinion of Stevens, J.). A judgment that is "a product of that process," the plurality said, "is entitled to a strong presumption of validity." *Ibid.*

The next Term, in *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), the Court held that, as a matter of procedural due process, States must afford judicial review of awards of punitive damages challenged as excessive. In so holding, the Court observed that the decisions in *Haslip* and *TXO* had "strongly emphasized the importance of the procedural component of the Due Process Clause" and had specifically emphasized the importance of appellate review. *Id.* at 420. *Haslip*, the Court explained, "stressed the availability of both 'meaningful and adequate review by the trial court' and subsequent appellate review," and *TXO* "found that the fact that the 'award was reviewed and upheld by the trial judge' and unanimously affirmed on appeal gave rise 'to a strong presumption of validity.'" *Id.* at 420-21 (quoting *Haslip*, 499 U.S. at 20, and *TXO*, 509 U.S. at 457). *Honda*

has in fact been interpreted to stand for the proposition that "appellate review of punitive damage awards [is] required." Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation*, 79 NOTRE DAME L. REV. 2025, 2027 (2004); accord Leonard E. Gross, *Time and Tide Wait for No Man: Should Lost Personal Time Be Compensable?*, 33 RUTGERS L.J. 683, 705 (2002).

b. If *Honda* did not already recognize a due-process right to appellate review of punitive awards, later decisions did. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court held that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards" and that vacatur and remand were required there because "the Court of Appeals applied an 'abuse of discretion' standard." *Id.* at 431, 436. The Court mandated *de novo* review because such review enables appellate courts "to maintain control of, and to clarify, the legal principles" governing the constitutionality of punitive awards and "tends to unify precedent and stabilize the law." *Id.* at 436 (internal quotation marks omitted). The Court found support for the requirement in *Haslip*, which "emphasized the importance of appellate review to ensuring that a jury's award of punitive damages comports with due process." *Id.* at 436 n.9 (citing *Haslip*, 499 U.S. at 20-21).

Unlike this case, *Cooper Industries* involved review of a punitive award by a *federal* appellate court. But subsequent decisions of this Court confirm that the holding of the case is based on the Due Process Clause and therefore that, as Professor Chemerinsky has put it, "state appellate courts, too, must exercise

de novo review over whether punitive damages are excessive." Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1069-1070 (2004).

Thus, in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), a case arising in state court, the Court explained that, in policing the "constitutional limitations" on punitive awards, it had "instructed courts reviewing punitive damages to consider [certain] guideposts" and had "mandated appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award," because "[e]xacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *Id.* at 416, 418 (citing and quoting *Cooper Indus.*, 543 U.S. at 424, 436). More recently, in *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057 (2007), another case arising in a state system, the Court explained that "the Constitution imposes certain limits[] in respect * * * to procedures for awarding punitive damages," and then listed, as one example of those constitutional limits, the rule that, under *Cooper Industries*, "review must be *de novo*." *Id.* at 1062. Consistent with those decisions, state courts have recognized that the holding of *Cooper Industries* applies to them as a matter of federal constitutional law. See, *e.g.*, *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 n.2 (Cal. 2005); *Daka, Inc.* v. *McCrae*, 839 A.2d 682, 697 (D.C. 2003); *Stroud* v. *Lints*, 790 N.E.2d 440, 442 (Ind. 2003); *Aken* v. *Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 668 (N.M. 2002).

If the Due Process Clause of the Fourteenth Amendment requires that appellate review of puni-

tive-damages awards be *de novo*, as this Court's cases establish, the Due Process Clause must require that there be appellate review of such awards. It cannot be that, although a State is constitutionally prohibited from engaging in deferential review of a punitive award, it is not constitutionally prohibited from providing no review at all. If deferential review is unconstitutional, as it is, then *no* review is unconstitutional a *fortiori*. A State cannot avoid its obligation to provide more than deferential review by providing less.

2. Even if this Court's decisions did not establish a due process right to appellate review, including review of punitive damages, the existence of such a right would follow from the application of the procedural due process methodology employed in *Honda*. Under that approach, the Court looks both to "[m]odern practice" and to "common-law practice." *Honda*, 512 U.S. at 426, 435; see also *TXO*, 509 U.S. at 457.

a. Under the modern practice, the nearly uniform rule is that litigants are entitled to at least one appeal as of right. West Virginia is one of only two States that does not afford such a right. In the remaining 48 States and the District of Columbia, as well as the federal system, a defendant has the right to appellate review, either by an intermediate appellate court or by a supreme court with mandatory jurisdiction. See App., *infra*, 38a-45a. Indeed, as far as appellate review of substantial punitive awards is concerned, West Virginia stands alone; the other State in which there is no appeal as of right—Virginia—protects against runaway awards by imposing a $350,000 cap. VA. CODE § 8.01-38.1.

The availability of an appeal as of right in all but two jurisdictions shows that the right of appeal "is a fundamental element of procedural fairness as generally understood in this country," Am. Bar Ass'n, Comm'n on Standards of Judicial Admin., Standards Relating to Appellate Courts § 3.10, at 18 (1994 ed.), and that a litigant's entitlement to "at least one review of an adverse final decision" is "firmly rooted," James D. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459, 463 (1975). Accordingly, just as there was a due-process violation in *Honda* because, "[i]n the federal courts and in every State[] except Oregon, judges review the size of damages awards," *Honda*, 512 U.S. at 426, there is a due-process violation here because, in the federal courts and in every State except West Virginia and one other, appellate courts review the size of damages awards upon the defendant's request.[3]

b. Under the common-law practice, too, courts acting in an appellate capacity reviewed damages awards. All of the eighteenth- and early nineteenth-century English cases cited in *Honda* for the proposition that "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded" were decisions of common-law courts that served as courts of review. *Honda*, 512 U.S. at 421; see *id.* at 421-423.[4] And there are numerous

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[3] The same consensus exists in Europe, where "[d]ecisions of the ordinary civil * * * courts of first instance may as a rule be appealed to an intermediate appellate court." MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 219 (3d ed. 2007).

[4] At that time in England, "the reviewing authorities for the writ of error operated under a horizontal system of 'mutual re-

other cases from that period—and earlier—in which English courts exercising an appellate function reviewed damages awards. See, *e.g.*, *Wilford* v. *Berkeley*, 97 Eng. Rep. 472, 472 (K.B. 1758) ("[t]he Court were, all three, clear and unanimous, that * * * there was no doubt of the power of the Court to exercise a proper discretion in setting aside verdicts for excessiveness of damages"); see also *Wood* v. *Gunston*, 82 Eng. Rep. 867 (K.B. 1655); *Bolton* v. *Thomson*, 84 Eng. Rep. 724 (K.B. 1674); *Clerk* v. *Udall*, 91 Eng. Rep. 552 (K.B. 1702); *Chambers* v. *Robinson*, 93 Eng. Rep. 787 (K.B. 1726).

State appellate courts in this country likewise reviewed damages awards—and overturned them when excessive—from the time of the Founding through the ratification of the Fourteenth Amendment and beyond. Most of the nineteenth-century cases cited in *Honda* for the proposition that "American courts reviewed * * * the amount of [damages] awards" were decisions of appellate courts. *Honda*, 512 U.S. at 425; see *ibid.* And there are many other such cases. See, *e.g.*, *Harton* v. *Reavis*, 4 N.C. 256, 257 (1815) (recognizing the "duty of the court" to set aside a damages award when the jury "acted under the influence, either of undue motives, or some gross error or misconception"); see also *Roberts* v. *Swift*, 1 Yeates 209, 212 (Pa. 1793); *Franz* v. *Hilterbrand*, 45 Mo. 121, 124 (1869); *Pac. R.R.* v. *Hause*, 1 Wyo. 27, 34 (1871); *Rogers* v. *Henry*, 32 Wis. 327, 334 (1873);

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view'" in which "the three central courts reviewed each other's decisions." Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 927 (1997). "Decisions in King's Bench were reviewed by justices from Common Pleas and the Exchequer. Decisions in Common Pleas were reviewed by justices of King's Bench. Decisions in the Exchequer were reviewed by justices of King's Bench and Common Pleas." *Ibid.*

*McKinley* v. *Chicago & N.W. R.R.*, 44 Iowa 314, 322 (1876), *aff'd*, 99 U.S. 147 (1878).

Moreover, the right of appellate review was by no means limited at common law to excessiveness questions, and review was not discretionary. Rather, "[t]hroughout Anglo-American justice systems in the late eighteenth century litigants were free to invoke * * * appellate jurisdiction as a matter of right." James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1570 (2001). At that time, in both England and the United States, "writs of error to secure review of judgments at common law[] were available to * * * petitioners in error as a matter of right." *Ibid.*; accord ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 88, 116 (1941). Thus, West Virginia's system of appellate review violates due process because it departs from the tradition under which "[c]ommon-law courts in the United States," like "their English predecessors," provided a right of appellate review of money judgments. *Honda*, 512 U.S. at 424.[5]

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[5] Another methodology that the Court has sometimes employed—the three-part balancing test of *Matthews* v. *Eldridge*, 424 U.S. 319 (1976)—yields the same result: Due process requires at least one appeal of right of a substantial damages award. First, it is beyond dispute that a large damages award threatens a cognizable property interest. *Id.* at 335. Second, because one-judge trial courts commit errors in a significant number of cases and West Virginia leaves correction of those errors to a purely discretionary system of appellate review, the risk of an erroneous deprivation of the property interest is high. *Ibid.* Third, although the cost of providing appellate review of right is not inconsequential, West Virginia need not create an intermediate appellate court to do so; it need only ensure that its Supreme Court of Appeals reviews substantial judgments.

3. On a number of occasions, this Court has stated that there is no constitutional right to an appeal in a criminal case. See, *e.g.*, *Smith* v. *Robbins*, 528 U.S. 259, 270 n.5 (2000); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Ross* v. *Moffitt*, 417 U.S. 600, 606 (1974). Those statements, however, are dicta. In all of the cases in which they appear, the State *did* provide the right to an appeal; the issue was whether the State discriminated in doing so. No decision of this Court has held that a defendant may be denied any appeal in a criminal case.

There is also good reason to believe that the statements are incorrect. The original source of the dictum—*McKane* v. *Durston*, 153 U.S. 684 (1894)—cited no support for the proposition that the Due Process Clause does not afford a right to appeal a criminal conviction. And some Justices have expressed "little doubt" that, if the question were ever presented, the Court "would decide that a State must afford at least some opportunity for review of convictions," because "[t]here are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a

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In any event, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard." *Id.* at 348. Indeed, because the issue here concerns disputes between private parties, the third element requires "principal attention to the interest of the [opposing] party," *Connecticut* v. *Doehr*, 501 U.S. 1, 11 (1991), and appellate review poses no threat to any legitimate interest of plaintiffs who have won a substantial money judgment. To the extent such a judgment is predicated on legal error, the system has no interest in leaving it uncorrected. As for awards of punitive damages, it is well accepted that they are in the nature of a windfall; plaintiffs have no "right" to receive any award of punitive damages, much less one that might be determined to be excessive after appellate review.

person's liberty or property" and "depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction." *Jones*, 463 U.S. at 756 n.1 (Brennan, J., joined by Marshall, J., dissenting).

Even if there is no constitutional right to appellate review of a criminal conviction, moreover, it does not follow that there is no constitutional right to appellate review of substantial damages awards. It has been suggested that there is no due-process right to a criminal appeal because "no appeals from convictions in the federal courts were afforded * * * for nearly a hundred years," and "there was no appeal from convictions" in England "until 1907." *Griffin* v. *Illinois*, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring in the judgment). With respect to appeals from judgments imposing substantial damages awards, however, there is no such "historic policy." *Ibid.* In fact, the contrary is true. "[A]t the same time that a federal defendant had no right to review of his criminal conviction, * * * a federal civil litigant had a right to appeal to the Supreme Court in causes involving more than $5,000." Gary Stein, Note, *Expanding the Due Process Rights of Indigent Litigants: Will* Texaco *Trickle Down*?, 61 N.Y.U. L. REV. 463, 467 n.31 (1986). And at the same time that an English defendant had no right to review of his criminal conviction, an English civil litigant had a right to review of a damages award. See *supra*, pp. 18-20. Even after criminal defendants were granted a right of appeal, the sentencing component of the judgment, unlike a punitive award, was—as it is today—generally reviewed with great deference. *Gall* v. *United States*, 128 S. Ct. 586, 591 (2008); *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989).

There would be no anomaly in holding that there is a right to appeal a substantial award of punitive damages or other civil liability but no right to appeal a criminal conviction. First, a defendant in a civil case in which punitive damages are sought does not have the benefit of the procedural protections afforded a defendant in a criminal case—the requirement of proof beyond a reasonable doubt being perhaps the most important (though hardly the only one). Second, unlike a sentence in a criminal case, which is limited by a statutory maximum (and sometimes a guidelines maximum), an award of punitive damages has no upper limit (unless the jurisdiction has imposed a cap). Third, a civil defendant against which a punitive award is entered has no entitlement to the other (non-appellate) forms of review available to a criminal defendant—state post-conviction review and federal habeas corpus.

Because a defendant facing a substantial punitive award lacks these protections, there is a greater risk that punishment will be erroneously imposed than in a criminal case. It is therefore perfectly sensible for the Constitution to afford a right to appeal a substantial punitive award, whether or not there is a right to appeal a criminal conviction. Indeed, in the same discussion in *State Farm* in which this Court made clear that parties have a constitutional right to *de novo* appellate review of a punitive-damages award, the Court pointed out that "defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding," even though "these awards serve the same purposes as criminal penalties." 538 U.S. at 417.

**B. The Issue Is Exceptionally Important.**

1. The fundamental unfairness of a statewide system in which a single-judge trial court can have the final say on whether a defendant must pay a substantial damages award, by itself, makes the issue in this case one of exceptional importance. Another factor makes it even more important: West Virginia's status as the most plaintiff-friendly and anti-business jurisdiction in the Nation, one in which staggeringly large verdicts against companies are routine.

According to a survey of in-house counsel, West Virginia has had the worst legal climate of the 50 States each of the past three years, "in part because of the state legislature's repeated failure to enact meaningful and comprehensive legal reform legislation, and in part because West Virginia courts are among the most anti-business in the country." U.S. Chamber Institute for Legal Reform, Lawsuit Climate 2008: Ranking the States 5, available at http://www.instituteforlegalreform.com/issues/tools/ppt/LawsuitAbuseFactFacts2008.ppt. Another tort-reform organization has labeled the entirety of West Virginia a "judicial hellhole," making it the only entire State to earn that distinction. Am. Tort Reform Found., *Judicial Hellholes 2007* at iii-iv, *available at* http://www.atra.org/reports/hellholes/report.pdf. The designation is based on the number of "massive lawsuits" that are filed and the number of "anti-business rulings" that are issued in the State—problems exacerbated by civil defendants' lack of "assurance that they will receive appellate review." *Id.* at iii.

In this case, the West Virginia Supreme Court of Appeals denied review of a judgment exceeding $200 million, approximately half of which was punitive.

On the same day, in *Estate of Tawney* v. *Columbia Natural Resources, LLC*, No. 32966, the court denied review of a judgment of approximately $400 million, more than half of which was punitive.[6] Those were two of the seven largest verdicts in the Nation in 2007; a third verdict in the top seven was also returned by a jury in West Virginia. VerdictSearch, *Top 100 Verdicts of 2007*, *available at* http://www.verdictsearch.com/index.jsp?do=top100.

The question whether defendants in West Virginia have a right to appellate review of large damages awards is exceptionally important, not only to the defendants in these three cases, but to any business that can be sued in the State. The importance of the question is confirmed by the fact that the Governor of West Virginia has taken the position, consistent with petitioners', that the Supreme Court of Appeals is obligated to review punitive-damages awards as a matter of federal constitutional law. See Br. of Joe Manchin, III, as *Amicus Curiae* in *E.I. du Point de Nemours & Co.* v. *Perrine*, No. 080721.

It is true that there is no conflict among the lower courts on the issue, but, as in *Honda*, that is not a reason to deny review. Among the 50 States, only West Virginia and Virginia do not provide an appeal as of right, and Virginia has adopted a $350,000 cap on punitive awards. Accordingly, the question whether there is a right to appellate review of punitive awards exceeding $350,000 can arise only in West Virginia.

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[6] The defendants in *Tawney* will be filing petitions for a writ of certiorari contemporaneously with the petitions in this case.

2. The circumstances of this case demonstrate why a failure to provide appellate review of a large punitive award is intolerable. They also make the case an ideal vehicle for deciding whether appellate review is constitutionally required.

As explained in the Circuit Court Petition (at 9, 26), (a) the jury imposed a punitive award of $100 million even though petitioners had no notice that their conduct could be subject to tort remedies and (b) the trial court then approved the award without considering whether a lower amount would be sufficient to serve the purposes of punishment and deterrence. The lack of notice and limited review at the trial-court level make appellate review of the punitive award in this case especially critical. Yet the Supreme Court of Appeals refused to provide any. This Court should grant certiorari to decide whether that result is permitted by the Constitution.

## II. REVIEW IS WARRANTED TO DECIDE WHETHER DUE PROCESS PROHIBITS A JUDGE WITH A HISTORY OF PERSONAL ATTACKS AGAINST A PARTY FROM PARTICIPATING IN THE CASE.

A. As a consequence of his deep-seated hostility towards Massey, Justice Starcher was constitutionally obligated to recuse himself from the consideration and disposition of the petitions for appeal.

1. "[A] fair tribunal is a basic requirement of due process," and a fair tribunal "of course requires an absence of actual bias" on the part of the decisionmaker. *In re Murchinson*, 349 U.S. 133, 136 (1955). A biased decisionmaker is "constitutionally unacceptable." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975); accord *Bracy* v. *Gramley*, 520 U.S. 899, 904-905

(1997). That means that no one may judge a case in which he or she has "an interest in the outcome." *Murchison*, 349 U.S. at 136. An "interest," in this context, is that which would lead a judge "not to hold the balance" between the parties "nice, clear, and true." *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972) (internal quotation marks omitted).

Such an interest may be financial. In *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), for example, this Court applied the principle that due process prohibits a judge from adjudicating a case if the judge has a direct and substantial pecuniary interest in the outcome. *Id.* at 821-822 (internal quotation marks omitted).

But a direct pecuniary interest is not the only type of interest that precludes a judge from acting as a decisionmaker. Actual bias requiring recusal under the Due Process Clause exists when the judge has "personal feeling against" a party, *Offutt* v. *United States*, 348 U.S. 11, 14 (1954), or an "unfavorable personal attitude toward" it, *Taylor* v. *Hayes*, 418 U.S. 488, 501 (1974); when the judge has become "embroiled in a running, bitter controversy" with the party, *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971); or when the judge otherwise harbors "hostility," *Offutt*, 348 U.S. at 16, toward the party.[7] The undisputed facts demonstrate beyond any doubt that Justice Starcher had an actual bias of this second

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[7] *Offutt* involved the exercise of this Court's supervisory powers, but the standard for actual bias applied in that case is little different from the standard applied in this Court's due process cases. See, *e.g.*, *United States* v. *Meyer*, 462 F.2d 827, 838 n.18 (D.C. Cir. 1972).

type: a deep-seated antagonism towards Massey and its chairman.

2. Over the course of the last several years, Justice Starcher has leveled a series of vituperative accusations against Massey and its chairman, Don Blankenship, so outlandish that it almost defies belief that the words could have been uttered by a justice of the State's highest court. Those statements, which are set forth in detail above, see *supra*, pp. 5-7, 9-11, include the assertions that Massey has no "concern or interest in the betterment of West Virginia" and is not "a good corporate citizen"; that Massey was attempting to "purchase" and "own" a seat on the State's Supreme Court of Appeals; that Massey's chairman, Mr. Blankenship, is "stupid" and a "clown"; that the conduct of Massey and its chairman is "obscene," "disgusting," "highly offen[sive]," "pernicious," "evil," and "cancer[ous]"; and that Massey and its chairman are comparable to violent criminals. Justice Starcher has not denied saying any of these things. On the contrary, he has candidly and unapologetically acknowledged making a number of the statements, at times repeating them with seeming relish.

If this record does not demonstrate a sufficient degree of personal antagonism to require a judge's recusal, it is difficult to imagine what would. In fact, this Court has required recusal for much less. See *Taylor*, 418 U.S. at 501-503; *Offutt*, 348 U.S. at 13-16. Indeed, it has done so in a case in which the attack was levied *by the party against the judge* (rather than the other way around). See *Mayberry*, 400 U.S. at 465-466.

Justice Starcher himself recognized that the facts recited above obligated him to recuse himself in

*Caperton*, where a Massey affiliate was a party, and he did ultimately recuse himself in that case. If recusal was necessary there, as it clearly was, it was equally necessary here. Cf. *United States* v. *Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001) (finding bias under the Judicial Code based on the judge's "crude characterizations of Microsoft" and his "frequent denigrations of Bill Gates" in statements to the media).

The reason Justice Starcher did *not* recuse himself in this case was that (i) he believed that Justice Benjamin, a supposedly "pro-Massey" Justice, should have recused himself as well; (ii) Justice Benjamin gave no indication that he intended to recuse himself; and (iii) even though Justice Starcher recognized the basis for his own recusal, he believed that it was more necessary for him to remain in the case as a counterweight to Justice Benjamin. See App., *infra*, 17a-18a. Even assuming, contrary to what we believe the law to be, that Justice Benjamin was required to recuse himself, his decision not to do so is of course an impermissible basis for Justice Starcher's decision not to recuse *himself*.

In the end, Justice Starcher seemed utterly unconcerned about whether his actions violated the Constitution. He concluded his opinion denying petitioners' request for recusal with the defiant pronouncement that, if his decision to participate in the case "can be argued to create due process problems," then "so be it." App., *infra*, 18a. About that, at least, Justice Starcher was correct. Indeed, as we explain above, there is more than a mere "argu[ment]" that Justice Starcher's recusal was constitutionally required; it self-evidently was.

B. The fact that the petitions for appeal were denied unanimously does not render the due-process violation harmless. Reversal is required regardless of whether the biased judge cast the deciding vote.

1. In *Lavoie*, the biased member of the appellate court *had* cast the deciding vote against the petitioner, and this Court found reversible constitutional error on that basis. The Court did not address the question whether, regardless of the vote, "a decision of a multimember tribunal must be vacated" whenever "one member who had an interest in the outcome of the case" participated in the decision. *Lavoie*, 475 U.S. at 827; see *id.* at 827 n.4. In concurring opinions, however, three members of the Court took the view that a decision must be vacated whenever a biased judge participates. *Id.* at 830-831 (Brennan, J., concurring); *id.* at 831-833 (Blackmun, J., joined by Marshall, J., concurring in the judgment).

That view is correct. As the concurrences explained, decisionmaking by a multi-member appellate court is a "shared enterprise" in which there is an "exchange of ideas," *Lavoie*, 475 U.S. at 831, 833 (Blackmun, J.), and the participation of an interested judge "*necessarily* imports a bias into [that] deliberative process," *id.* at 831 (Brennan, J.). That was the rule in English courts in the nineteenth century—a highly relevant consideration when seeking to determine the guarantees of the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *Queen* v. *Justices of Hertfordshire*, 115 Eng. Rep. 284, 285 (Q.B. 1845) ("The magistrates discuss the question among themselves; and it is impossible to say what effect that discussion may have on the decision."); see also

*Queen* v. *Justices of Suffolk*, 118 Eng. Rep. 156 (Q.B. 1852); *Queen* v. *Meyer*, 1 Q.B.D. 173, 176 (1875).

2. As the Court indicated in *Lavoie*, see 475 U.S. at 827, lower courts in the United States have divided over the question. Five circuits and at least five state courts of last resort have concluded that reversal is required whenever a biased member of a multi-member tribunal participates in the consideration and disposition of the case. See *Cinderella Career & Finishing Schs., Inc.* v. *FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Berkshire Employees Ass'n* v. *NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); *Am. Cyanamid Co.* v. *FTC*, 363 F.2d 757, 767-768 (6th Cir. 1966); *Stivers* v. *Pierce*, 71 F.3d 732, 746-748 (9th Cir. 1995); *Hicks* v. *City of Watonga*, 942 F.2d 737, 748 (10th Cir. 1991); *Nationwide Mut. Ins. Co.* v. *Clay*, 525 So.2d 1339, 1341 (Ala. 1987) (per curiam); *Johnson* v. *Sturdivant*, 758 S.W.2d 415, 416 (Ark. 1988); *Rollins* v. *Connor*, 69 A. 777, 778-779 (N.H. 1908); *Powell* v. *Anderson*, 660 N.W.2d 107, 122-123 (Minn. 2003); *State ex rel. Getchel* v. *Bradish*, 70 N.W. 172, 173 (Wis. 1897). Like the concurring Justices in *Lavoie*, those courts correctly recognize that each member of a tribunal "contributes not only his vote but also his voice to the deliberative process," *Stivers*, 71 F.3d at 747, and that reversal is required because the influence the biased member "might have upon the decision * * * cannot be estimated," *Rollins*, 69 A. at 779.

In contrast, one circuit and a number of state courts of last resort have concluded that reversal is not required when the biased member did not cast the deciding vote. See *Bradshaw* v. *McCotter*, 796 F.2d 100, 101 (5th Cir. 1986); *Caples* v. *Taliaferro*, 200 So. 378, 381-382 (Fla. 1941) (per curiam); *Big-*

*gins* v. *Lambert*, 73 N.E.371, 373 (Ill. 1905); *State ex rel. Langer* v. *Kositzky*, 166 N.W. 534, 535 (N.D. 1918); *Goodheart* v. *Casey*, 565 A.2d 757, 761-762 (Pa. 1989); *State* v. *Lund*, 718 A.2d 413, 418-419 (Vt. 1998). Those decisions are mistaken. None of them engages, much less refutes, the argument against their position—that the bias of any judge infects the deliberative process. And some of the decisions rest on the mistaken premise that *Lavoie* held reversal to be required only when the biased judge's vote was decisive (rather than having simply reserved the question). See *Bradshaw*, 796 F.2d at 101; *Goodheart*, 565 A.2d at 761.

C. The question whether due process was violated by Justice Starcher's participation in the consideration and disposition of the petitions for appeal is exceptionally important, and therefore warrants review. First, Justice Starcher's refusal to recuse himself despite his deep-seated animosity towards Massey brazenly disregards the due-process principles established in a long line of this Court's decisions on judicial bias. Second, this case provides the Court with an opportunity to resolve the question that was left open in *Lavoie* and has divided the lower courts: whether a biased appellate judge must cast the deciding vote in order for reversal to be required. Third, Justice Starcher's hostility towards Massey is such a shockingly egregious instance of judicial bias that the denial, with his participation, of Massey's request for review of a $243 million judgment against it simply should not be permitted to stand.[8]

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[8] It does not follow from this that the Court should grant the petition in *Caperton* v. *A.T. Massey Coal Co.*, No. 08-22, filed

## CONCLUSION

The petition for a writ of certiorari should be granted.

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July 2, 2008. That petition presents the question whether Justice Benjamin's refusal to recuse himself in a case in which a Massey affiliate was a party violated due process because Massey's chairman made substantial financial contributions that supported the election of Justice Benjamin, and the defeat of his opponent, in 2004. As will be explained in more detail in the brief in opposition in that case, the petition in *Caperton* should be denied because this Court's due process decisions do not require recusal of a judge with a mere "appearance" of bias, and such a standard in any event has no place in the context of campaign contributions, which are an inherent feature of elected judiciaries. In this case, in contrast, Justice Starcher's bias was self-evidently an *actual* one.

Respectfully submitted.

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*Counsel for Petitioners*

AUGUST 2008

# APPENDIX

# APPENDIX A

## STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2008, the following order was made and entered:

Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, Plaintiffs Below, Respondents

v.

Central West Virginia Energy Company and Massey Energy Company, Defendants Below, Petitioners

No. 080182

On a former day, to-wit, March 12, 2008, came the petitioner, Massey Energy Company, by W. Henry Jernigan, Jr., Timbera C. Wilcox, Ramonda C. Lyons and Nicholas S. Johnson, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Brooke County, rendered on the 4th day of September, 2007, with the record accompanying the petition. Thereafter, on the 11th day of April, 2008, came the respondents, Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, by David B. Cross and David F. Cross; and David B. Fawcett and Gregory J. Krock, Buchanan Ingersoll & Rooney, their attorneys, and presented to the Court their written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Chief Justice Maynard disqualified. Senior

Status Judge Jolliffe sitting by temporary assignment.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

## APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2008, the following order was made and entered:

Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, Plaintiffs Below, Respondents

v.

Central West Virginia Energy Company and Massey Energy Company, Defendants Below, Petitioners

No. 080183

On a former day, to-wit, March 13, 2008, came the petitioner, Central West Virginia Energy Company, by James A. Walls, Matthew P. Heiskell and David B. Hanna, Spilman Thomas & Battle, PLLC; and Joseph G. Nogan, Sellitti, Nogay & McCune, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Brooke County, rendered on the 4th day of September, 2007, with the record accompanying the petition. Thereafter, on the 11th day of April, 2008, came the respondents, Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, by David B. Cross and David F. Cross; and David B. Fawcett and Gregory J. Krock, Buchanan Ingersoll & Rooney, their attorneys, and presented to the Court their written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Chief Justice Maynard disqualified. Senior

Status Judge Jolliffe sitting by temporary assignment.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

# APPENDIX C

## STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 19th day of December 2007, the following order was made and entered:

Central West Virginia Energy Company and Massey Energy Company Petitioners

v.

Wheeling Pittsburgh Steel Corporation and Mountain State Carbon Respondents

No. 07-185

This day came the Honorable Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of his refusal to disqualify himself from participating in the above-captioned proceeding, pursuant to Rule 29 of the Rules of Appellate Procedure.

A True Copy

/s/ Rory I. Perry

[Text Obscured] of Appeals

Supreme Court of Appeals
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
(304) 558-2604
(304) 558-4308 Fax

December 19, 2007

**Larry V. Starcher**
Justice

MEMORANDUM

TO: Rory Perry, Clerk

FROM: Justice Larry V. Starcher

RE: *Central West Virginia Energy Company and Massey Energy Company v. Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC*
Appeal No. _____[1]

**A Joint Motion To Recuse The Honorable Larry Starcher** was filed in the proceedings in the above-named case on December 10, 2007. This is, perhaps, the seventh motion to disqualify me filed on behalf of Massey Energy Company, its subsidiaries, and/or Don Blankenship, CEO of Massey.

The thrust of this Massey Motion remains the same as in the past—that I have a legally disqualifying personal bias against Mr. Blankenship and/or the Massey entities.

The drafters of the Motion simply added details from a recent dissent I filed in a Massey case.

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[1] The pleading I was presented did not have a designated "Appeal No."

My response to this Motion is the same as stated earlier. See all previous responses that are of record.

Again, I repeat that I have no financial interest in this case, do not know any of the litigants, and certainly have never socialized with any of the litigants, nor have any of the litigants directly or indirectly funded political campaigns on my behalf, nor do I have personal knowledge of any disputed facts in the litigation.

Therefore, I again respectfully decline to recuse myself from this matter pursuant to Rule 29 of our Rules of Appellate Procedure, I can fairly sit on this matter and correctly and fairly apply the law.

I respectfully decline to step aside.

LVS:lw

xc: Other Justices (with motion)
James A. Walls, Esq.
W. Henry Jernigan, Jr., Esq.
David B. Fawcett, Esq.
David B. Cross, Esq.

## APPENDIX D

Central West Virginia Energy Company,
Massey Energy Company, Appellants

v.

Wheeling Pittsburgh Steel Corporation; Mountain State Carbon, LLC, Appellees

Pre-Appeal No. 07-185

On the 10th day of March, 2008, the appellants in the instant case ("the *Wheeling-Pitt* case") filed a RENEWED JOINT MOTION TO RECUSE THE HONORABLE LARRY STARCHER. The appellants—referred to jointly as "Massey"—had previously filed a joint motion requesting the same relief on December 10, 2007. On December 19, 2007, I responded to that motion and declined to step aside. This is my response to the appellants' most recent motion.

I previously scheduled a public hearing on this motion, believing it would be helpful to orally hear from the parties' lawyers and to have those lawyers answer questions that bear on the reasons for the motion, and the standards they would have a judge apply in recusal matters. I believed it would be helpful for this particular case, and for recusals in future cases. However, following this Court's refusal of appellants' petition seeking the prohibition of the hearing, somewhat as a compromise with other members of the Court, and pending a decision by this Court in administrative conference on the issue of whether a single justice may hold a hearing on a recusal request, I canceled the hearing.

I then sent the appellants interrogatories that are pending. Because I have been advised that the

petition for appeal in the underlying case will be presented to this Court soon, and because I believe that I can make an informed and properly-grounded decision without receiving appellants' response to those interrogatories, I feel that I should respond to the motion at this time. The interrogatories are canceled —still, I believe that the appellants have an independent duty to disclose to this Court certain information related to their CEO's conduct, as further explained *infra*.

Relevant background for my decision includes the following: On February 15, 2008, I filed a statement announcing that I was stepping aside in a separate "Massey case," styled *A. T. Massey Coal Company, Inc., et al. v. Hugh M. Caperton, et al.* ("the *Caperton* case"). I said that I hoped that my voluntarily stepping aside in the *Caperton* case would be followed by the similar voluntary stepping aside of a justice whose election was supported by Massey's CEO, Mr. Don Blankenship, to the tune of over $3.5 million dollars. In my statement, I noted my previous stepping aside in a case years earlier over the issue of $36,000 in contributions to my campaign. I also noted in my recusal response in the *Caperton* case that it was this same justice's senior law clerk who (as a lawyer) argued in the earlier case that a judge should step aside when campaign contributions are, under the circumstances, sizable enough to suggest to the public in a given case an appearance of possible impropriety—in that instance $36,000.[1]

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[1] The senior law clerk once said that "campaign money can give an appearance of justice for sale," and said that substantial campaign contributions by a litigant "demeans the office of

I acted in the *Caperton* case because I wanted to help restore public confidence in this Court. But the hoped-for stepping aside by the justice whose election so greatly benefitted from Massey's CEO did not occur. Instead, that justice ended up as the Acting Chief Justice in the *Caperton* case. He appointed my replacement, and both he and my replacement cast votes for Massey in the rehearing of the *Caperton* case. As a result, it seems likely that public confidence in the Court's decision in the *Caperton* case is close to zero.

Now Massey is asking me to step aside in another case, because I have publicly criticized certain conduct of Massey's CEO—conduct that I believe has adversely affected the administration of justice in our State and has created a "cancer" in our Court. Just recently, some of Mr. Blankenship's conduct was reported on national television. Among other things, we learned that in July of 2006, Mr. Blankenship "bought dinner" for Mr. Blankenship's "good friend," the Chief Justice of this Court – while they were together on vacation in Monaco on the French Riviera—at a time when what ultimately became an over-seventy-million-dollar verdict against Massey was pending before this Court. We know that remaining on Massey cases was consistent with the Chief Justice's practice of routinely voting on Massey-related matters for years before and well after the Monaco trip, and that it was not until photographs of the Riviera vacation were disclosed that he began stepping aside in Massey cases.

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judge and destroys the public's confidence in the integrity and impartiality of the judiciary." As of April 24, 2008, an essay explaining the senior law clerk's position could be found at: http://www.wvcala.org/eye/cont_mcelwee.htm.

We were told on national television by the Chief Justice that Mr. Blankenship paid for at least one of the vacation dinners for the Chief Justice (and presumably for the Chief Justice's companion), and we know that the vacation was never disclosed to this Court or the public until very recently—after the photographs were publicly disclosed.

I have a pretty good idea—based on the photographs submitted to this Court, some under seal—that the dinner in question was not consumed at an IHOP or even an Applebee's. No—the meal that Mr. Blankenship likely bought for the Chief Justice was served in a very nice restaurant in or near the ancient principality of Monaco. Imagine the scene: It is the height of the summer "season" on the Riviera, when the world's wealthy come to Monaco, some by air and many by yachts, to gamble, socialize, drink, and dine. I really do not know the prices for meals in this rich man's world, but, for sure, they equal or are in excess of meals in even our most expensive American venues. A "dinner" —cocktails, appetizer, entree and dessert—in a Monte Carlo casino restaurant for four could well approach a thousand or more dollars. And we now *know* that Mr. Blankenship picked up *at least one* of these checks.

Just imagine—*with a seventy-million-dollar-plus case pending before the Justice who is seated across from him*, Mr. Blankenship leans forward and picks up the check, and says to his "good friend,"—"I'll get that, Judge."

I think a lot of people would like to see that check. Lacking the hard evidence of a receipt, most of us can only guess at the amount; if we did know the exact amount, I'd guess that we would be

shocked. Of course, I could be wrong. Maybe the foursome dined at the local Monte Carlo Subway. But the photographic evidence is to the contrary—and the best evidence would be the receipt, something that Mr. Blankenship could probably produce—if he wanted to.

When the photographs of the Monaco vacation were filed with this Court, and a clerk brought copies to my chambers, as well as to other justices' chambers, confirming rumors and reports that I had heard off and on for over a year, I was shocked. I had never seen those photographs before they were filed, and I had nothing to do with their disclosure to the lawyers for Mr. Caperton. The rumor mill has it that the photographs were taken on Mr. Blankenship's companion's camera; for those who are pursuing the trail of the photos, perhaps they should begin at the source, if they are sincere in wanting to learn about their distribution.

Those photographs were not posed to mislead, nor were they taken as part of a "police sting." They are not "entrapment" or "smears," nor are they a "setup." Those photographs are *evidence*—candid and damning photographic evidence of just how much how Mr. Blankenship's conduct has led to the national perception that our West Virginia Supreme Court of Appeals is "farcical." For some political spinmeisters, this evidence is deeply threatening and shameful. But there it is.

Since Massey likes to include press clippings with its motions, let me quote from an editorial in the *New York Times* of April 15, 2008, by Dorothy Samuels. Ms. Samuels says: "In West Virginia, meanwhile, the State Supreme Court's handling of a

case involving a large coal company, Massey Energy, took on a decidedly farcical flavor. For the second time, the appellate court threw out a $50 million verdict against Massey."

Ms. Samuels continues: "The court decided to rehear the case after photographs publicly surfaced of its chief justice, Elliott Maynard, vacationing in Monte Carlo with Massey's chief executive, Don Blankenship, in 2006, while the matter was pending in the Supreme Court. The chief justice disqualified himself from the rehearing. So did another justice, Larry Starcher, because he had publicly criticized Blankenship and his company. The 3-to-2 outcome in favor of Massey was unchanged from the first round, which might not have been noteworthy except that the deciding vote was cast once again by Justice Brent Benjamin, who declined to recuse himself despite owing his election to the court to more than $3 million spent by Mr. Blankenship. In response to such travesties, judicial reformers have stepped up their call for public financing and strict fund-raising rules for state judicial contests or a switch to a nonelective merit selection system."

"Farcical?" "Travesties?" Unfortunately, I think that Ms. Samuels has not overstated the case. How else are the owners and workers at the Caperton mines, or the stockholders and steelworkers at Wheeling-Pitt, entitled to feel, when they see this evidence? How else is the public entitled to feel about this evidence? How does this evidence – and the conduct that it reveals—affect public confidence in our Court system?

The *Code of Judicial Conduct*, Canon 4(D)(5) says: "A judge shall not accept . . . a gift, bequest,

favor, or loan from anyone except for . . . a gift . . . from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification[.]" In other words, the only way that Mr. Blankenship could have legally bought that "dinner" for the Chief Justice was if the Chief Justice had already stepped aside in Massey cases—which he had not.

The photographs of the vacation, and the admission that Mr. Blankenship "bought dinner" for the Chief Justice on the Riviera—these undisputed facts reveal only a *portion of the truth* about Mr. Blankenship's conduct while Massey cases have been pending before this Court. The public and this Court have an absolute right to know *the complete truth.*

Just how many meals and drinks and other costs did Mr. Blankenship finance on the Monaco vacation —the Chief Justice seemed equivocal in his response to the ABC reporter, as did Mr. Blankenship when the photographs were first made public. What meals and drinks, if any, has Mr. Blankenship bought for the Chief Justice at *any* times when Massey had cases pending before this Court? Are there other favors or benefits that Mr. Blankenship has provided for the Chief Justice or his companion? (I frankly wonder whether Mr. Blankenship has ever disclosed to his lawyers his "good friendship" with the Chief Justice. If he did so, and they did not tell him that he must take appropriate action, then I would question those lawyers' judgment.)

And another question: What are the details of reported contacts by Mr. Blankenship and the Chief Justice with Court staff about the photographs and

the vacation? Has there been an attempt to shade the truth, or worse?

I think Massey should immediately produce and file with this Court the receipt for "the dinner" —and for all other entertainment or gifts to determine if the reports have any basis that Mr. Blankenship may have provided for the Chief Justice or his companion during the Monaco vacation. Massey should also provide a detailed list of and receipts for every other occasion that Mr. Blankenship has "bought dinner" for or provided anything of value to *any* justice of this Court while Massey had cases pending here; and the details of any occasions when any justice of this Court has "bought dinner" for Mr. Blankenship at a time when Massey had cases pending before this Court.

There has been a suggestion made that the "good friendship" between Mr. Blankenship and the Chief Justice is "common knowledge" and has been so for years. This is contrary to what I have been told over the years. Rather, to me, this seems to be a recently-manufactured response to the photographs having dropped into the public domain. Where is the evidence of this "common knowledge"? How could a "good friendship" that includes expensive dinner-buying, vacation-sharing, and whatever else—have been "commonly known" by members of the public like, say, the lawyers in the *Caperton* and *Wheeling-Pitt* cases – and those lawyers not make a motion to recuse the Chief Justice before the truth-telling photos were made public? The truth—*the truth*—is that the "good friends" relationship between the two and the details of that relationship have *never* been disclosed in any of Massey's considerable litigation.

I wonder why.

The foregoing discussion of improper conduct by Massey's CEO while Massey cases are pending before this Court provides the reason and sets the ground for my deciding whether I should step aside in the *Wheeling-Pitt* case—because of my publicly-stated low opinion of that CEO's conduct in relation to this Court. (I apologize for calling Mr. Blankenship "stupid" and a "clown." He is obviously an intelligent person. Intelligent people, however, can do stupid and even clownish things—I should know.)

I have stepped aside in a small number of cases in my judicial career, but rarely (if ever) because I seriously disapproved of the conduct of the person before me. That standard would be entirely unworkable. For example, I have reviewed the cases of many people who were convicted of heinous crimes like rape and child molestation and murder. In many of these cases, the defendant had confessed and was clearly guilty and I tended to have a personal dislike for the defendant. But some aspect of the defendant's case needed judicial review, notably sentencing. And while I strongly disapprove of rape, child molestation and murder, that doesn't mean I have to step aside in those cases.

But if a convicted child molester were also my "good friend" who had been buying me expensive dinners on the Riviera—then I think I should step aside.

Or if a convicted murderer, or his family, had donated nearly four million dollars to help my election, then I think I should step aside in that case, too, even if he hadn't bought me dinner.

I said in my statement in the *Caperton* case that my stepping aside might be a step in treating a "cancer on our Court"—but *only if* the Acting Chief Justice in that case would also step aside. Despite many calls for him to do so, he has chosen not to. One poll submitted to this Court found that 67% of average citizens thought he should step aside; another found that 88% thought the same.

Here's my quandary as a justice committed to doing justice and promoting public confidence in the courts: If I alone step aside in the instant *Wheeling-Pitt* case, my replacement will be selected by an Acting Chief Justice whose campaign was supported by over $3.5 million from the CEO of a litigant in the case, a man whose conduct in relation to this Court while that litigant had pending cases before this Court is under a grave cloud. And if I alone step aside, that Acting Chief Justice will both appoint my replacement and vote on issues affecting that litigant —even though according to the arguments of the Acting Chief Justice's Senior Law Clerk, a judge should step aside in such a case because of such reasonable concerns by the public. And if I alone step aside, then what will the parties to the lawsuit, and our citizens, think about the fairness of our Court?

In good conscience, trying my best to fulfill my responsibility to the people of West Virginia in difficult circumstances, I cannot step aside and allow this additional "travesty" to happen. I know that I can set aside my feelings about Mr. Blankenship's conduct, and fairly judge the legal issues involved—I have done it in hundreds of cases over the last three decades. Therefore, in the interest of justice, I respectfully decline to recuse myself although *I will step aside* following the very moment that the Acting

Chief Justice in this case does so, should he make that decision. And if he does not, I will give my best based on the law, secure in the knowledge that no litigant in the case has been my "good friend" or my great benefactor.

I again challenge all parties to read United States Supreme Court cases such as *Aetna Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) and *In re Murchison*, 349 U.S. 133 (1955). If my decision to participate in the instant case can be argued to create due process problems of constitutional dimensions, so be it. If matters relating to Massey's treatment in our Court are addressed in the federal courts, or even by our Nation's highest court, we will surely be told that $3,500,000 in electoral support by the CEO of an active litigant in the Court is sufficient to create "an appearance of impropriety"—not to mention "the dinner," and the French (Riviera) Connection.

For the foregoing reasons, in the interest of justice, on this 24 day of April, 2008, I decline to recuse myself in the above-styled case.

/s/ Larry V. Starcher
Justice Larry V. Starcher

## APPENDIX E

**IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA**

WHEELING PITTSBURGH STEEL CORPORATION and MOUNTAIN STATE CARBON, LLC,

Plaintiffs,

v.

CENTRAL WEST VIRGINIA ENERGY COMPANY and MASSEY ENERGY COMPANY,

Defendants.

Civil Action No: 05-C-85

**ORDER**

This matter came before the Court on the 30th day of July 2007 for hearing on Motions filed by the parties subsequent to the jury trial in this matter. The Court heard argument from counsel on Defendant, Central West Virginia Energy Company's Motion for Judgment as a Matter of Law as to the Claims asserted in its First Supplement to Counterclaim against Plaintiff, Mountain State Carbon, LLC. The Court heard argument from counsel, as well as testimony of Plaintiffs' witness, on Plaintiffs' Motion to include Pre-Judgment Interest. Finally, the Court heard oral argument on Plaintiffs' Motion for the Court to Affirm the Jury's Award of Punitive Damages. The Court has reviewed the Motions, the Responses thereto, and the memoranda of law; considered all papers of record; heard the arguments of counsel; and reviewed all pertinent legal authorities.

Plaintiffs appeared by counsel, David B. Fawcett, Esquire and Gregory J. Krock, Esquire of Bu-

chanan, Ingersoll & Rooney, P.C., and David F. Cross, Esquire of Cross Law Offices; Defendant, Central West Virginia Energy Company, appeared by counsel James A. Walls, Esquire and Matthew P. Heiskell, Esquire of Spilman Thomas & Battle, PLLC; Defendant, Massey Energy Company, appeared by counsel W. Henry Jernigan, Jr., Esquire, of Dinsmore & Shohl, LLP.

**Counterclaim of Defendant, Central West Virginia Energy Company**

Defendant, Central West Virginia Energy Company, previously moved this Court for leave to file a Supplemental Counterclaim which leave was granted by the Court. The Court orally ruled that such counterclaim was strictly an issue of law that would be determined by the Court at the conclusion of the trial. The Court received no response from Plaintiffs to the Counterclaim. After the trial, Defendant moved for judgment as a matter of law. The Court received Plaintiffs' response to Defendant's Motion at the hearing.

Defendant argues that Plaintiff, Mountain State Carbon, did not pay the contractually agreed upon price for coal shipments made in November 2006 and December 2006. It is the position of Defendant that the contract amount per ton of coal changed effective November 1 of 2006 pursuant to the written agreement between the parties establishing the contractual year to be November 1 through October 31. Plaintiffs requested an opportunity to respond arguing that the parties established a course of conduct that altered the contractual year to a calendar year.

After reviewing the Motion of Defendant, the Response thereto, and the memoranda of law; considering all papers of record; hearing the arguments of counsel; and reviewing all pertinent legal authorities, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) The issues raised by Defendant's Counterclaim are strictly legal issues.

2) In order to determine the legal issues raised by the Counterclaim, the contract between the parties must be interpreted.

3) "It is the province of the court, and not of the jury, to interpret a written contract." Syl. Pt. 1, *Orteza* v. *Monongalia County General Hosp.*, 173 W.Va 461, 318 S.E.2d 40 (1984) quoting Syl. Pt. 1, *Stephens* v. *Bartlett*, 118 W.Va. 421, 191 S.E.2d 550 (1937).

4) "Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 2, *Orteza* v. *Monongalia County General Hosp.*, 173 W.Va, 461, 318 S.E.2d 40 (1984) quoting Syl. Pt. 2, *Bethlehem Mines Corp.* v. *Haden*, 153 W.Va. 721, 172 S.E.2d 126 (1969).

5) The Coal Supply Agreement entered into between the parties is not ambiguous; therefore, the Court cannot look outside of the contract in making its determination regarding Defendant's Counterclaim.

6) In making its determination with regard to Defendant's Counterclaim, the Court did not consider any affidavits or trial testimony, but, rather, based its determination on the actual language of the contract between the parties.

7) The Coal Supply Agreement clearly defines the contract year to be November 1 through October 31; therefore, any modification to the price of coal made pursuant to the agreement between the parties would become effective November 1st of each contract year.

8) Defendant, Central West Virginia Energy Company, shipped to Plaintiff, Mountain State Carbon, 122,287 tons of coal in November and December 2006.

9) The price of coal increased by $34.65 per ton effective November 1, 2006.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Defendant, Central West Virginia Energy Company's Counterclaim against Mountain State Carbon is GRANTED; therefore, Defendant, Central West Virginia Energy Company, is entitled to an offset of the verdict rendered against it in the amount of $4,237,269.84 plus pre-judgment interest in the amount of $262,570.74; therefore, judgment is entered for Defendant, Central West Virginia Energy Company, on its counterclaim in the amount of $4,499,840.58.

**Prejudgment Interest**

Plaintiffs moved the Court to include prejudgment interest at the rate of 10% on the jury verdict. Defendants argued that a recent statutory change in West Virginia lowered the interest rate to 9.75% of a portion, if not all, of the jury's award.

After reviewing the Motion of Plaintiffs; considering all papers of record; hearing the testimony of Plaintiffs' witness and the arguments of counsel; and reviewing all pertinent legal authorities, the

Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) The West Virginia Legislature amended the statutory interest rate in June 2006 by amending *W.Va. Code § 56-6-31.*

2) Pursuant to this Amendment, the Supreme Court of Appeals of West Virginia entered an Administrative Order on the 2nd day of January 2007 establishing the rate of interest for the year 2007 to be 9.75% as determined by applying the standards set forth in *W. Va. Code § 56-6-31.*

3) For all applicable time periods prior to 2007, the statutory rate of interest was 10%.

4) Plaintiffs argue that their judgment falls within an exception set forth in *W.Va. Code § 56-6-31*, because the damages fell within the definition of special damages excluding it from the requirements of applying the lesser interest rate.

5) If an award falls within this exception, the applicable rate of interest is the interest rate from the year in which the right to bring the action accrued.

6) Plaintiffs' jury award does, in fact, fall within the statutory exception; therefore, Plaintiffs are entitled to receive pre-judgment interest in the amount of interest from the year in which the right to bring the action accrued; that being 10%.

7) Plaintiffs offered the testimony of their financial expert along with a report that he prepared calculating the amount of pre-judgment interest.

8) Plaintiffs' expert testified that pre-judgment interest on the jury's verdict at the rate of

10% would be Twenty-Four Million Fifty-Three Thousand Six Hundred Sixty-Nine Dollars ($24,053,669)

9) Plaintiffs' expert testified as an expert in his field that his basis for calculation was reasonable and acceptable in his profession.

10) Defendants did not produce any rebuttal evidence, but argued that and Plaintiffs' expert did not properly calculate the interest because he used the wrong dates when making his calculations.

11) The Court finds that the evidence produced by Plaintiffs was the best information available to the Court.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion to include Pre-Judgment Interest at the rate of 10% in the amount of Twenty-Four Million Fifty-Three Thousand Six Hundred Sixty-Nine Dollars ($24,053,669) is GRANTED.

**Punitive Damages Award**

Plaintiffs' moved the Court to affirm the Jury's Award of Punitive Damages because the conduct of Defendants was reprehensible when they made fraudulent misrepresentations to induce Plaintiffs to remain in the contract knowing that they would not supply Plaintiffs with the requisite coal in order to sell the coal to other customers at a higher price.

Defendants argue that their actions were not reprehensible, that the jury's verdict was clearly an award for breach of contract damages as opposed to a tort claim, and that such an award could lead to other claims that would be detrimental to their com-

panies. Defendants assert that the only way the jury could have found fraud was to conclude that Defendants had an obligation to disclose to Plaintiffs their sales to other customers, which Defendants assert that no such duty existed.

After reviewing the Motion of Plaintiffs, the Response thereto, and the memoranda of law; considering all papers of record; hearing the arguments of counsel; and reviewing all pertinent legal authorities, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) "Punitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions." Syl. Pt. 1, *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

2) "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically in-

struct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant."

Syl. Pt. 3, *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

3) "When the trial court reviews an award of punitive damages, the court should, at a mini-

mum, consider the factors given to the jury as well as the following additional factors:

> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury." Syl. Pt. 4, *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

4) Most, if not all, of the force majeure notices that this Court held valid on their face alleged that Defendants could not supply the requisite coal to Plaintiffs due to a railcar shortage.

5) The jury verdict form contained a specific question regarding the underlying incidents set forth in the force majeure notices.

6) The jury did not find that the underlying incidents set forth in the force majeure notices actually occurred and were the reasons for the coal shortages to Plaintiffs.

7) Based upon the jury's answers on the verdict form, it is clear the jury found the force majeure notices without a legal, factual basis.

8) In order for the jury to find that the force majeure notices were without a legal, factual basis, the jury must have concluded that Defendants created the railcar shortage by requesting that the rail carrier send more of its cars for shipment to higher paying customers.

9) Defendants made the fraudulent affirmative statement that they could not control the allocation of railcars.

10) However, the Court found it very suggestive of Defendants' ability to control the allocation of railroad cars when Plaintiff, Wheeling Pittsburgh Steel Corporation, advised Defendants it would have to shut down because they could not receive barge shipments, Defendants were able to immediately ship coal by railcars all of the way to Follansbee.

11) Moreover, it was in Defendants' best interest to keep Plaintiffs in the contract. If Defendants were found guilty of a breach and Plaintiffs were permitted to purchase coal from other suppliers, Defendants would have been forced to pay the difference in price over the life of the contract between Plaintiffs and Defendants.

12) The Defendants are sophisticated, knowledgeable companies that knew what they were doing when they manipulated and/or caused the railcar shortages.

13) The conduct of Defendants, assuring Plaintiffs that they would do everything possible to supply the requisite coal, persisted for over two years leaving Plaintiffs in an unfortunate position.

14) Defendants attempts to conceal their fraudulent conduct continued for that period.

15) In their attempts to conceal, Defendants blamed CSX Transportation, their railcar carrier.

16) Because of Defendants' conduct, the length of time that Plaintiffs continued to suffer damages lengthened and the amount of their damages increased.

17) Because Defendants didn't disclose that they had other international customers paying substantially higher prices for their coal, Plaintiffs remained in the contract. Subsequently, Plaintiffs were under pressure to remain in the contract resulting in harm to Plaintiffs.

18) The punitive damage award in this case bears a reasonable relationship to the harm caused by Defendants' conduct as well as to the compensatory damages awarded, considering that the combined punitive damages are less than the compensatory damage award.

19) Defendants' conduct is also found to be reprehensible.

20) Defendants alleged that a nonexistent railcar shortage was the reason that they could not

supply Plaintiffs with the coal they were contracted to sell.

21) Defendants did everything they could to encourage Plaintiffs to remain in the contract in order to sell enough coal to Plaintiffs to discourage an action for breach which would have cost Defendants substantially more over the life of the contract.

22) These actions by Defendants went on in excess of two years.

23) The award in this case will not bankrupt Defendants.

24) The Court was only made aware of one other lawsuit filed based on similar acquisitions against Defendant, Massey Energy Company.

25) The Court is of the opinion that it should not reduce the amount of damages based on potential awards or claims in other cases.

26) It will be for any future Courts deciding similar claims to consider this action.

27) Based on the massive amount of discovery and the length of the trial in this matter, the costs expended by Plaintiffs in prosecuting this action must have been substantial.

28) Even with the punitive damage award, Plaintiffs may never be made whole.

29) Just because the amount of damages were the same for both the breach of contract claim and the tort claim, this Court cannot find that the jury was awarding damages for breach of contract only.

30) In their verdict form, the jury clearly indicated that they found both Defendants to be guilty of fraud.

31) The Court is of the opinion that the jury did, in fact, award punitive damages as damages based on the fraud.

32) The Court is of the belief that the amount of damages in this case would be equal or close to the amount of profit Defendants derived from their fraud; however, after considering all of the other factors to be considered by the Court, the Court is of the opinion that the findings with regard to the other factors strongly support the verdict in this case.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for the Court to Affirm the Jury's Award of Punitive Damages is GRANTED.

**Jury Verdict**

The trial of this matter commenced on the 30th day of May 2007 and concluded on the 2nd day of July 2007 upon the return of a unanimous jury verdict. Based upon such verdict and the rulings made herein:

It is hereby ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiffs, Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, against Defendant, Central West Virginia Energy Company, in the amount of One Hundred Nineteen Million Eight Hundred Fifty Thousand Dollars ($119,850,000) plus prejudgment interest in the amount of Twenty-Four Million Fifty-Three Thousand, Six Hundred Sixty-

Nine Dollars ($24,053,669). Defendant, Massey Energy Company, is jointly and severally liable for the judgment entered in favor of Plaintiff, Wheeling Pittsburgh Steel Corporation.

It is further ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiff, Wheeling Pittsburgh Steel Corporation, against Defendant, Central West Virginia Energy Company, in the amount of Fifty Million Dollars ($50,000,000).

It is further ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiff, Wheeling Pittsburgh Steel Corporation, against Defendant, Massey Energy Company, in the amount of Fifty Million Dollars ($50,000,000).

It is further ORDERED, ADJUDGED, and DECREED that Defendant, Central West Virginia Energy Company, is entitled to a set-off of the judgment against it in favor of Plaintiff, Mountain State Carbon, LLC, in the amount of $4,237,269.84 plus pre-judgment interest in the amount of $262,570.74.

The Clerk of the Circuit Court shall forward attested copies to all counsel of record.

ENTERED this 2nd day of August 2007.

/s/ Martin J. Gaughan
MARTIN J. GAUGHAN, CHIEF JUDGE
FIRST JUDICIAL CIRCUIT

By: Charmaine R. Galiano
Deputy

## APPENDIX F

## IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

WHEELING PITTSBURGH STEEL CORPORATION and MOUNTAIN STATE CARBON, LLC,
Plaintiffs,
v.
CENTRAL WEST VIRGINIA ENERGY COMPANY AND MASSEY ENERGY COMPANY,
Defendants.

Civil Action No: 05-C-85

### ORDER

Currently before the Court are Defendants' Joint Motions and Memorandums of Law for: Judgment as a Matter of Law or, in the alternative, a New Trial with regard to the Tort Claims and Punitive Damages Award; a New Trial based upon Improper Admission of 404(b) Evidence; based upon Bias and Prejudice of the Jury; a New Trial based upon Admission of Purported Expert Testimony of Alan Stagg.

This Court has reviewed the Defendants' Motions, the Memorandums of Law in Support, considered all papers of record, and reviewed all pertinent legal authorities. After careful consideration of Defendants' Motions for a New Trial, this Court is of the opinion that these matters were previously considered by the court.

**WHEREFORE**, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for Judgment as a Matter of Law or, in the alternative, for a New Trial

with regard to the Tort Claims and Punitive Damages Award is **DENIED** without hearing.

**WHEREFORE**, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Improper Admission of 404(b) Evidence is **DENIED** without hearing.

**WHEREFORE**, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Bias and Prejudice of the Jury is **DENIED** without hearing.

**WHEREFORE**, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Admission of Purported Expert Testimony of Alan Stagg is **DENIED** without hearing.

The Clerk of the Circuit Court shall forward attested copies of this Order to all counsel of record.

**ENTERED** this 31st day of August 2007.

/s/ Martin J. Gaughan
MARTIN J. GAUGHAN, CHIEF JUDGE
First Judicial Circuit

By: /s/ Charmaine R. Galiano
Charmaine R. Galiano
Deputy

## APPENDIX G

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "No State shall * * * deprive any person of life, liberty, or property without due process of law * * * ."

Rule 3 of the West Virginia Rules of Appellate Procedure provides:

> (a) *Time for Petition.* No petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been entered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered * * * .
>
> * * *

Rule 5 of the West Virginia Rules of Appellate Procedure provides:

> (a) *Time for Hearing.* If desired, counsel for the petitioner or a petitioner unrepresented by counsel shall request oral presentation of the petition in the docketing statement filed with the petition. The Court, at its discretion, may allow counsel for the petitioner or a petitioner unrepresented by counsel to make oral presentation, unless such right to orally present a petition is otherwise

> provided by law. The respondent shall not be entitled to participate in the oral presentation of the petition, unless otherwise provided by law.
>
> * * *

Rule 7 of the West Virginia Rules of Appellate Procedure provides:

> (a) *Rejection.* If the petition for appeal is rejected by the Supreme Court on the ground that the judgment or order is plainly right, no other petition for appeal from that judgment or order shall be permitted. If the petition for appeal is rejected on any other ground, or if no ground be cited in the rejection, the petitioner may renew the petition as many times as he desires during the period prescribed by law for presentation of petitions.
>
> * * *

Rule 29 of the West Virgina Rules of Appellate Procedure provides:

> (a) *Motions for Disqualification.* In any proceeding, any party may file a written motion for disqualification of a justice within thirty days after discovering the ground for disqualification and not less than seven days prior to any scheduled proceedings in the matter. * * *
>
> (b) *Grounds for Disqualification.* A justice shall disqualify himself or

herself, upon proper motion or sua sponte, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct or, when sua sponte, for any other reason the justice deems appropriate.

* * *

(f) *Decision on Motion.* The justice shall promptly notify the Clerk of the Supreme Court of his or her decision on the motion for disqualification and the Clerk of the Supreme Court shall promptly notify the other justices and the parties of such decision.

# APPENDIX H

## STATE STATUTES GOVERNING APPEALS IN CIVIL AND CRIMINAL CASES

### ALABAMA

CIVIL: ALA. CODE §§ 12-11-30, 12-22-2; ALA. R. APP. P. 39.

CRIMINAL: ALA. CODE §§ 12-3-9, 12-11-30, 12-22-130; ALA. R. APP. P. 39.

### ALASKA

CIVIL & CRIMINAL: ALASKA STAT. § 22.05.010(a)-(b).

### ARIZONA

CIVIL: ARIZ. REV. STAT. ANN. §§ 12-2101, 13-4031.

CRIMINAL: ARIZ. CONST. art. 2, § 24; ARIZ. REV. STAT. ANN. § 13-4031; ARIZ. R. CRIM. P. 31.19.

### ARKANSAS

CIVIL: ARK. STAT. ANN § 16-67-308; ARK. SUP. CT. R. 1-2(a), (e); ARK. R. APP. P. 2.

CRIMINAL: ARK. STAT. ANN § 16-91-101(a); ARK. SUP. CT. R. 1-2(a), (e).

### CALIFORNIA

CIVIL: CAL. CONST. art. VI, § 12; CAL. CODE CIV. P. § 904.1(a).

CRIMINAL: CAL. CONST. art. VI, §§ 11, 12(b), (d); CAL. PENAL CODE § 1237.

## COLORADO

CIVIL: COLO. APP. R. 1(a)(1), 49.

CRIMINAL: COLO. REV. STAT. §§ 13-4-102, 16-12-101; COLO. APP. R. 49.

## CONNECTICUT

CIVIL: CONN. GEN. STAT. ANN. §§ 51-197a, 52-263; CONN. R. APP. P. 61-1, 84-1.

CRIMINAL: CONN. GEN. STAT. ANN. § 54-95; CONN. R. APP. P. 61-6, 84-1.

## DELAWARE

CIVIL: DEL. CONST. art. 4, § 11(1)(A); DEL CODE ANN., tit. 10, § 142.

CRIMINAL: DEL. CONST. art. 4, §§ 11(1)(b), 28; DEL. CODE ANN., tit. 11 § 5301.

## DISTRICT OF COLUMBIA

CIVIL & CRIMINAL: D.C. STAT. § 11-721(a), (b).

## FLORIDA

CIVIL: FLA. CONST. art. V, §§ 3, 4(b)(2); FLA. R. APP. P. 9.030(b)(1)(a).

CRIMINAL: FLA. CONST. art. V, §§ 3, 4(b)(1), 5(b); FLA. STAT. ANN. §§ 924.05-06.

## GEORGIA

CIVIL & CRIMINAL: GA. CONST. art. VI, § 5 ¶¶ III, V; GA. STAT. ANN. §5-6-33(a).

## HAWAII

CIVIL: HAW. REV. STAT. §§ 602-59, 641-1.

CRIMINAL: HAW. REV. STAT. §§ 602-59, 641-11.

## IDAHO

CIVIL: IDAHO CODE ANN. §§ 1-2409, 13-201; IDAHO APP. R. 4, 11(a).

CRIMINAL: IDAHO CODE ANN. §§ 1-2406, 1-2409, 19-2801; IDAHO APP. R. 4, 11(c).

## ILLINOIS

CIVIL & CRIMINAL: ILL. CONST. art. VI, §§ 4(b), (c), 6; ILL. SUP. CT. R. 315(a).

## INDIANA

CIVIL & CRIMINAL: IND. CONST. art. 7, §§ 4, 6; IND. R. APP. P. 4(A)(1)(a), 5(A).

## IOWA

CIVIL: IOWA R. APP. P. 6.1(1), 6.3.

CRIMINAL: IOWA CODE ANN. §§ 602.4102(2),(4), 602.5103(b), 814.6(1).

## KANSAS

CIVIL: KAN. STAT. ANN. § 60-2102(a)(4).

CRIMINAL: KAN. STAT. ANN. §§ 20-3018(b), 22-3601, 22-3602.

## KENTUCKY

CIVIL & CRIMINAL: KY. CONST. §§ 110(2)(b), 115; KY. REV. STAT. ANN. § 22A.020; KY. R. CIV. P. 76.20; KY. R. CRIM. P. 12.02.

## LOUISIANA

CIVIL: LA. CODE CIV. PROC. ANN art. 2082, 2088, 2166(e).

CRIMINAL: LA. CODE CRIM. PROC. ANN. art. 911, 912.1.

**MAINE**

CIVIL: 14 ME. REV. STAT. ANN. §§ 1851, 1901.

CRIMINAL: 15 ME. REV. STAT. ANN. § 2111(1).

**MARYLAND**

CIVIL & CRIMINAL: MD. CODE ANN. CTS. & JUD. PROC. §§ 12-301, 12-307(4), 12-308, 12-403(a).

**MASSACHUSETTS**

CIVIL: MASS. GEN. LAWS. ch. 231 § 113, MASS. GEN. LAWS ANN. ch. 211A, §§ 10-11.

CRIMINAL: MASS. GEN. LAWS ANN. ch. 278, § 28; MASS. GEN. LAWS ANN. ch. 211A, § 10.

**MICHIGAN**

CIVIL: MICH. CT. R. 7.203(A)(1), 7.301.

CRIMINAL: MICH. COMP. LAWS ANN. §§ 600.215, 600.232, 770.3(1)(a); MICH. CT. R. 7.301.

**MINNESOTA**

CIVIL: MINN. R. CIV. APP. P. 103.03, 117, subd. 2.

CRIMINAL: MINN. R. CRIM. PROC. 28.02, subd. 2, 29.02, subd. 1-2.

**MISSISSIPPI**

CIVIL: MISS. CODE. ANN. §11-51-3.

CRIMINAL: MISS. CODE ANN. § 99-35-101.

**MISSOURI**

CIVIL: MO. CONST. art. V, §§ 3, 10; MO. ANN. STAT. § 512.020.

CRIMINAL: MO. CONST. art. V, §§ 3, 10; MO. ANN. STAT. § 547.070.

**MONTANA**

CIVIL: MONT. CODE ANN. § 3-2-203; MONT. R. APP. P. 1, 6.

CRIMINAL: MONT. CODE ANN. §§ 3-2-203, 46-20-104.

**NEBRASKA**

CIVIL & CRIMINAL: NEB. CONST. art. I, § 23, 25; NEB. REV. STAT. §§ 24-1107, 25-1912.

**NEVADA**

CIVIL: NEV. R. APP. P. 3A.

CRIMINAL: NEV. REV. STAT. § 177.015(1), (3).

**NEW HAMPSHIRE**

CIVIL & CRIMINAL: N.H. SUP. CT. R. 7.

**NEW JERSEY**

CIVIL: N. J. R. APP. PRAC. 2:2-1(b), 2:2-3.

CRIMINAL: N.J. CONST. Art. VI, § 5, p. 1(c); N. J. R. APP. PRAC. 2:2-1(a)-(b), 2:3-2.

**NEW MEXICO**

CIVIL & CRIMINAL: N.M. CONST. art. VI, § 2; N. M. STAT. ANN. §§ 34-5-8(A)(3), 34-5-14.

**NEW YORK**

CIVIL: N.Y. C.P.L.R. 5511, 5602(a).

CRIMINAL: N.Y. CRIM. PROC. LAW §§ 450.10(1), 450.70, 450.90; N.Y. C.P.L.R. 5602(a).

**NORTH CAROLINA**

CIVIL & CRIMINAL: N.C. GEN. STAT. §§ 7A-27(a)-(c), 7A-30, 31.

**NORTH DAKOTA**

CIVIL & CRIMINAL: N.D. CENT. CODE §§ 28-27-01, 29-28-02, 29-28-03, 29-28-06.

**OHIO**

CIVIL: OHIO CONST. art. IV, §§ 2(B)(2)(e), 3; OHIO REV. CODE ANN. § 2505.03(A).

CRIMINAL: OHIO CONST. art. IV, §§ 2(B)(2)(c), (e); OHIO REV. CODE ANN. § 2953.02.

**OKLAHOMA**

CIVIL: 12 OKLA. STAT. ANN §§ 951-952, 990(A); 20 OKLA. STAT. ANN. § 30.1.

CRIMINAL: 22 OKLA. STAT. ANN. § 1051(a).

**OREGON**

CIVIL: OR. REV. STAT. ANN. §§ 2.516, 2.520, 19.205(1), 19.245(1).

CRIMINAL: OR. REV. STAT. §§ 2.520, 138.040.

**PENNSYLVANIA**

CIVIL & CRIMINAL: PA. CONST. art. 5, § 9; 42 PA. CONST. STAT. ANN. §§ 722-724, 741-762, 5105(a).

**RHODE ISLAND**

CIVIL: R.I. GEN. LAWS §§ 9-24-1, 9-24-11.

CRIMINAL: R. I. GEN. LAWS §§ 9-24-11, 9-24-32.

**SOUTH CAROLINA**

CIVIL & CRIMINAL: S.C. CODE ANN. §§ 14-8-200, 14-8-210, 18-9-20; S.C. R. APP. PRAC. 201.

**SOUTH DAKOTA**

CIVIL: S.D. CODIFIED LAWS ANN. § 15-26(A)-3.

CRIMINAL: S.D. CODIFIED LAWS ANN. § 23A-32-2.

## TENNESSEE

CIVIL: TENN. CODE ANN. § 16-4-108, TENN. R. APP. P. 3(a).

CRIMINAL: TENN. CODE ANN. §§ 16-5-108, 39-13-206; TENN. R. APP. P. 3(b), 11.

## TEXAS

CIVIL: TX. GOV'T CODE ANN. §§ 22.007, 22.225; TX. CIV. PRAC. & REM. CODE ANN. § 51.012.

CRIMINAL: TEX. CONST. art. 5, § 5(b); TEX. CODE CRIM. P. ANN. art. 4.03, 44.02, 44.45.

## UTAH

CIVIL: UTAH CONST. art. VIII, § 5; UTAH CODE ANN. §§ 78A-3-102, 78A-4-105.

CRIMINAL: UTAH CONST. art. I, § 12; UTAH CODE ANN. §§ 78A-3-102, 78A-4-103, 105.

## VERMONT

CIVIL & CRIMINAL: VT. CONST. ch. 2, § 30, VT. STAT. ANN. tit. 13, § 7401 (2008).

## VIRGINIA

CIVIL: VA. CODE. ANN. § 8.01-670(A)(3).

CRIMINAL: VA. CODE ANN. §§ 17.1-406(A)-(B), 17.1-411.

## WASHINGTON

CIVIL: WASH. REV. CODE ANN. § 2.06.030; WASH. R. APP. P. 2.2(a)(1).

CRIMINAL: WASH. CONST. art. I, § 22; WASH. REV. CODE ANN. § 10.95.100.

**WEST VIRGINIA**

CIVIL & CRIMINAL: W. VA. CODE § 58-5-1(j); W. VA. R. APP. P. 7.

**WISCONSIN**

CIVIL & CRIMINAL: WISC. CONST. art. I, § 21; WIS. STAT. ANN. §§ 808.01, 808.03, 809.62 (civil appeals).

**WYOMING**

CIVIL: WYO. CONST. art. 5, § 18, WYO. R. APP. P. 2.01a.

CRIMINAL: WYO. CONST. art. 5, § 3; WYO. STAT. §§ 6-2-103, 7-12-101.

Supreme Court, U.S.
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Nos. 08–217 and 08–218

IN THE
# Supreme Court of the United States

CENTRAL WEST VIRGINIA ENERGY COMPANY AND MASSEY ENERGY COMPANY,
*Petitioners,*

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON, LLC,
*Respondents.*

**On Petitions For Writs Of Certiorari To The Supreme Court Of West Virginia (No. 08–217) And Circuit Court Of Brooke County, West Virginia (No. 08–218)**

## BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the extensive post–trial and appellate procedures followed by West Virginia's courts in reviewing the punitive damage awards in this case—which included a post–trial hearing and review of the evidence by the trial court, and then *de novo* review by the West Virginia Supreme Court of Appeals—satisfy the Due Process Clause?

2. Does the Due Process Clause require the recusal of an appellate court justice who, in accordance with the justice's right to comment on matters affecting the administration of justice, has criticized a corporation's political efforts to influence the appellate court?

3. Did a trial judge who conducted a *de novo* review of punitive damage awards that are each less than one–half of the compensatory award, and issued thirty–two (32) separate findings and conclusions explaining the grounds for upholding the punitive awards, violate the Due Process Clause by failing to provide meaningful review?

## RULE 29.6 STATEMENT

Wheeling Pittsburgh Steel Corporation is now known as Severstal Wheeling, Inc. Severstal Wheeling, Inc. is a subsidiary of Severstal US Holdings, LLC, which is a subsidiary of OAO Severstal, a publicly–traded company on the London Stock Exchange. No other publicly–traded company has any ownership interest in Severstal Wheeling, Inc.

Mountain State Carbon, LLC is a Delaware limited liability company. Its members are Severstal Wheeling, Inc. and SNA Carbon, LLC. Both members are indirect subsidiaries of OAO Severstal, a publicly–traded company on the London Stock Exchange. No other publicly–traded company has any ownership interest in Mountain State Carbon, LLC.

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## BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents Wheeling Pittsburgh Steel Corporation ("Wheeling Pitt") and Mountain State Carbon, LLC ("Mountain State") respectfully submit this brief in opposition to the petitions for writs of certiorari regarding the rulings of the Supreme Court of Appeals of West Virginia (No. 08–217) and the Circuit Court of Brooke County, West Virginia (No. 08–218).

## COUNTER–STATEMENT OF THE CASE

Petitioners attack the constitutionality of punitive damage awards that (1) a properly–instructed jury imposed after a five–week trial; (2) the trial judge upheld after requiring extensive post–trial briefing and oral argument; and (3) the appellate court reviewed *de novo,* after receiving the entire trial record and petitioners' summary of the relevant evidence, and rejected further review by a vote of five to zero.[1] The principal premise underlying the arguments raised by petitioners and their *amici* is that the West Virginia courts provided little or no review of the punitive damage awards imposed by the jury. In reality, both the Trial Court and WV Supreme Court adequately reviewed the awards.

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[1] For ease of reference, the Circuit Court of Brooke County, West Virginia is identified herein as the "Trial Court" and the West Virginia Supreme Court of Appeals is identified as the "WV Supreme Court."

Indeed, following this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the WV Supreme Court delineated detailed and extensive procedures for reviewing punitive damage awards in West Virginia. These procedures include an independent post–trial review of the evidence by the trial judge under exacting standards and then a merits–based review by the WV Supreme Court during the petition phase of the appellate process. The Trial Court and WV Supreme Court followed these extensive procedures in this case.

Thus, this case does not involve the denial of judicial or appellate review, but instead petitioners' request for *more* or *different* review. Petitioners want the Trial Court to explain, even more than it has already explained in the 32 separate findings of fact and conclusions of law set forth in its opinion upholding the punitive damage awards, the bases for its conclusion that the awards were appropriate. Presumably, they want the WV Supreme Court to entertain oral argument and issue a detailed written opinion supporting the conclusion that it reached after a *de novo* review. In support of their argument, petitioners note that other states (except for Virginia) choose to provide judicial review of punitive damage awards in a manner that differs from West Virginia, and ask this Court to instruct West Virginia to change its judicial system to conform with those states' systems.

This Court's function, however, is not to determine which state's judicial system is preferable. Nor is it this Court's role to require unanimity among the states. As it has done in the past in

response to similar petitions attacking West Virginia's judicial system, this Court should once again refuse to second–guess the judicial procedures adopted by West Virginia and it should deny the petitions.

## A. Wheeling Pitt's Fraud Claim

This case involves more than a routine breach of contract. Instead, the case involves an extensive fraudulent scheme that petitioners undertook over a period of several years with full knowledge that their misconduct might cause catastrophic harm to Wheeling Pitt's business.

In particular, the jury found that petitioners made a series of misrepresentations to create the illusion that "events beyond their control" caused delivery shortfalls of coal and resultant damage to Wheeling Pitt's coke plant, when in fact petitioners were opportunely choosing to sell their coal to other customers to take advantage of skyrocketing coal prices on the world market. This fraudulent scheme was designed to induce Wheeling Pitt to remain in its long–term supply contract with Central West Virginia Energy Company ("CWVEC"), an indirect subsidiary of Massey Energy Company ("Massey Energy"),[2] under which it paid CWVEC tens of millions of dollars per year. The contract required Wheeling Pitt to purchase more than one million tons of high volatile metallurgical coal per year, which often amounted to more than 10% of Massey's

[2] Massey Energy and all of its direct and indirect subsidiaries are collectively identified herein as "Massey."

annual production. Thus, the scheme's dual purpose was to retain Wheeling Pitt as a long–term customer while maximizing Massey Energy's profits by diverting coal from Wheeling Pitt to higher–paying export customers.

## B. Evidence of Fraud Introduced at Trial

When the worldwide price for metallurgical coal skyrocketed in late 2003 and early 2004, Massey Energy directed its subsidiaries to solicit and enter into new contracts with export customers at high prices. Tr. 3318, 3408. Massey was aware, however, that it could not produce and deliver enough coal to satisfy both these new contracts and existing contracts. Pl. Ex. 215A (internal Massey memo acknowledging that shipping to the new export customers could "run domestic customers out of coal"); Pl. Ex. 245. Massey nevertheless entered into the new contracts, prioritized shipments to its new high–priced customers, and received tens of millions of additional dollars for its coal. Tr. 4608–10; Pl. Ex. 519E.

CWVEC then drastically curtailed the required shipments to Wheeling Pitt. CWVEC failed to deliver nearly 500,000 tons to Wheeling Pitt in 2004 (approximately 42% of Wheeling Pitt's requirements that year). Pl. Ex. 490D. Massey was well aware that these delivery failures would cause grave injury to Wheeling Pitt in the form of increased costs of acquiring coal and physical harm to Wheeling Pitt's coke plant. Tr. 953–54. These damages were so extensive that they jeopardized Wheeling Pitt's very existence. *Id.* During the same

time period, Massey delivered more than 1 million tons of high volatile metallurgical coal to new export customers to whom it had not budgeted to sell a single ton of coal in 2004. Tr. 1396; Pl. Ex. 519E. Massey could have used this coal to honor CWVEC's contractual obligations to Wheeling Pitt, but instead chose to sell it to new customers at higher prices.

Petitioners made numerous fraudulent misrepresentations to Wheeling Pitt to prevent it from discovering their scheme and to keep it from terminating the contract, filing a lawsuit, or taking other remedial actions in response to CWVEC's delivery failures. First, petitioners falsely represented that Massey experienced unexpected and catastrophic labor, transportation, and mining problems in order to deceive Wheeling Pitt into believing that the delivery failures were both temporary and unavoidable. Massey issued 28 separate letters over a roughly two–year period purporting to declare force majeure as an excuse for CWVEC's delivery failures.[3] Pl. Ex. 165A–165C. Many of these representations were blatantly false. For example:

- Petitioners falsely represented that Massey experienced catastrophic railcar shortages in 2004 and 2005. In reality, Massey received

[3] In contrast, CWVEC declared only one event of force majeure during the first 10 years that the contract was in effect. Tr. 614–42.

more railcars in 2004 and 2005 than the previous years.[4] Tr. 4616–19.

- Petitioners falsely represented that Massey experienced severe labor shortages. In reality, Massey employed more workers in 2004 than 2003, and then even more workers in 2005. Pl. Exs. 391, 398.

- Petitioners falsely represented that Massey experienced unforeseen mining conditions that decreased its production. In reality, Massey's own documents proved that the conditions either (1) were anticipated by Massey or (2) did not materially affect production. Tr. 2209–30.

Second, Petitioners falsely represented that diligent remedial efforts were being undertaken to enable CWVEC to deliver the required coal to Wheeling Pitt. But, contrary to petitioners' contention, Massey did not make capital expenditures or purchase coal in order to fulfill promises to Wheeling Pitt. For example, Massey did in fact invest millions of dollars and open a new mine that produced coal that almost perfectly matched Wheeling Pitt's specifications at the very

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[4] In fact, the president of the railroad company (CSX Transportation) sent a note to Massey stating that CSX had provided 10% *more* rail service to Massey, and was therefore not to blame for CWVEC's failure to deliver nearly 50% of Wheeling Pitt's coal. CSX further stated that it was Massey, and not CSX, that decided where to ship Massey's coal. Pl. Ex. 208.

time that CWVEC was delivering only a fraction of the required coal to Wheeling Pitt. However, the coal from this new mine—which Wheeling Pitt desperately needed—was *not* intended for Wheeling Pitt as Massey claimed. Instead, Massey entered into a new contract to ship the coal to a new customer at a price that was more than twice the amount that Wheeling Pitt was paying for its coal. Tr. 3680–86; Pl. Ex. 328. Petitioners' contention that Massey was increasing its purchases from third–party coal producers to supplement its own production in order to get coal to Wheeling Pitt was similarly false. Massey's coal purchases actually *decreased* during in 2004 and 2005. Tr. 2395–96.

Third, petitioners failed to disclose that—at the very same time that they were representing that Massey had suffered catastrophic problems, but was doing everything possible to remedy them and increase shipments to Wheeling Pitt—Massey was entering into still more contracts to sell hundreds of thousands of additional tons of high volatile metallurgical coal to new export customers. Tr. 976. The failure to disclose these substantial new commitments was also intended to maintain the false assurances that Wheeling Pitt would receive its required coal in the future. When Wheeling Pitt ultimately learned through industry periodicals that Massey was engaged in significant export sales, and inquired about them, Massey's metallurgical salesman falsely stated that the sales involved "steam" coal that would not meet Wheeling Pitt's specifications. *Id.* at 599–600.

Petitioners had a powerful financial motive to undertake this fraudulent scheme. The parties' contract contained a price re–opener provision that enabled CWVEC to adjust the price that it charged Wheeling Pitt in 2007. CWVEC would therefore be able to require Wheeling Pitt to pay the then–existing market price in 2007. *Id.* at 695–97. Petitioners' scheme was to ship as little coal as necessary to keep the contract with Wheeling Pitt alive until the price re–opener took effect, and take maximum advantage of the soaring coal prices in the meantime.

### C. The Trial Court's Review of the Punitive Damage Awards

At the end of the five–week trial, the jury—in a series of special interrogatories—found by clear and convincing evidence that petitioners made fraudulent misrepresentations upon which Wheeling Pitt relied. Verdict Form, ¶¶ 7, 11. The jury determined that the misrepresentations caused Wheeling Pitt to incur $10.75 million in damage to one of its coke batteries, $45.1 million in increased costs of acquiring coal, and $64 million in increased costs associated with acquiring coke. *Id.* at ¶¶ 8, 12. In total, the jury awarded Wheeling Pitt compensatory damages in the amount of $119.5 million. Because the jury found petitioners' fraudulent scheme and misrepresentations to be malicious, wanton, and oppressive, it also imposed $50 million in punitive damages upon each petitioner. *Id.* at ¶¶ 9–10, 13–14. The punitive damage to compensatory ratio in this case is therefore approximately 0.4:1— less than ½ to one.

Shortly after the jury entered its verdict, Wheeling Pitt moved the Trial Court to uphold the punitive damage awards and enter judgment pursuant to the procedures that the WV Supreme Court established for post–trial review of punitive damage awards in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991). Wheeling Pitt filed a brief summarizing the evidence and setting forth the bases for upholding the awards. In their 27–page opposition brief, petitioners argued that the awards were improper and excessive based on the evidence introduced at trial. Petitioners also attempted to submit new evidence, in the form of affidavits and spreadsheets, regarding the amount of profit that they received by defrauding Wheeling Pitt.

After conducting a lengthy hearing on the motion, the Trial Court upheld the punitive damage awards and entered judgment. In the portion of the Order addressing punitive damages, the Trial Court included 32 separately–numbered paragraphs setting forth its findings of fact and conclusions of law. Pet. App. 24a–31a. The Trial Court determined that petitioners sold coal to higher–paying customers, misrepresented that they did not control the routes of their railcars, used their available railcars to ship coal to the higher–paying customers, failed to disclose the new export sales, concealed their scheme, and did everything they could—over a two–year time period—to keep Wheeling Pitt in the contract and prevent it from exercising its rights. *Id.* at 28a–31a. The Trial Court concluded that this conduct was so reprehensible that it warranted the punitive damage awards. *Id.* The Trial Court further determined

that the punitive damage awards bear a reasonable relationship to the harm caused by petitioners, especially given that even the amount of the punitive damage awards *combined* is less than the amount of compensatory damages. *Id.* at 29a.

### D. The West Virginia Supreme Court's *De Novo* Review

Petitioners filed their petitions for appeal with the WV Supreme Court in December 2007. After receiving leave to file amended petitions in excess of the 50–page limit, petitioners filed amended petitions in March 2008. CWVEC's amended petition contained 65 pages and Massey Energy's contained 75 pages. Petitioners devoted a significant portion of their amended petitions to challenging the punitive damage awards. On January 10, 2008—three months *before* petitioners filed their amended petitions, the Trial Court sent the entire trial record to the WV Supreme Court. *See* Respondents' Appendix (excerpt of docket from Trial Court evidencing submission of the record to the WV Supreme Court) at 1b–2b.[5]

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[5] Petitioners initially moved to recuse Justice Larry Starcher on December 10, 2007. Petitioners identified 11 statements that Justice Starcher made about Massey and/or its Chief Executive Officer, Don Blankenship, which they claimed to evidence his bias against Massey. Ten of those statements pertained to a specific topic—Massey's political involvement in attempts to elect candidates that it favors to the WV Supreme Court. Petitioners based their recusal motion exclusively on the ethical canons and laws of West Virginia. They did not cite to the United States Constitution, refer to federal due process,

After receiving the trial record, lengthy amended petitions, and respondents' opposition briefs, the WV Supreme Court conducted a *de novo* review of the punitive damage awards. *Boyd v. Goffoli*, 608 S.E.2d 169, 176 (W. Va. 2004) (the WV Supreme Court provides *de novo* review to punitive damage awards). The WV Supreme Court concluded that further review was unwarranted and, by order dated May 22, 2008, refused the amended petitions by a unanimous vote of five to zero.

## REASONS FOR DENYING CERTIORARI

### A. Certiorari Is Not Warranted Because Petitioners Failed to Preserve a Due Process Challenge to West Virginia's System of Appellate Review and Received All of the Process That They Were Due

This Court should deny review of petitioners' claim that the West Virginia courts failed to provide appellate review for three independent reasons. First, petitioners have waived the issue by failing to raise it with the WV Supreme Court. Second, it is well established that the Due Process Clause does not require appellate review in either civil or criminal cases. Third, the WV Supreme Court

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or rely upon federal law. Petitioners later filed three supplemental motions and/or submissions in which they renewed their request that Justice Starcher recuse himself. In none of these supplemental filings did petitioners cite to or otherwise rely upon federal law.

nevertheless conducted a *de novo* review of the punitive damage awards in this case.

### 1. Petitioners Have Not Preserved the Issue by Raising It With the WV Supreme Court

"It is well settled that this Court will not review a final judgment of a state court unless the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (internal quotation omitted). This Court has recognized an exception to the rule, however, where the highest state court renders an unexpected interpretation of state law. *Herndon v. Georgia*, 295 U.S. 441, 443–44 (1935),

In *Herndon*, this Court held that an interpretation cannot be "unexpected"—and must be challenged below—if the state court announced that same interpretation in the past. The petitioner in *Herndon* alleged that a statute criminalizing attempts to incite insurrection was unconstitutional because it did not require that "immediate serious violence against the State of Georgia was to be expected or advocated." *Id.* at 444. The petitioner had not raised this argument below, however. This Court rejected the petitioner's argument that the issue involved an unexpected interpretation of state law because the state court had recently ruled (in a dispute known as the "Carr Case") that proof of imminent violence was not a required element under the statute. *Id.* at 445–46. The Court explained that

the petitioner could not " plead ignorance of the ruling in the Carr Case, and was therefore bound to anticipate the probability of a similar ruling in its own case, and preserve his right to review here by appropriate action upon the original hearing in the court below." *Id.* at 446.

*Herdon* is directly on point. It is undisputed that petitioners did not argue below that the United States Constitution *required* the WV Supreme Court to accept the appeal and provide further review. Nor can petitioners contend that the WV Supreme Court's decision was unexpected. The WV Supreme Court has consistently stated, for almost 20 years, that it reviews punitive damage awards at the petition for appeal stage and that further review is not necessarily required. *Garnes*, 413 S.E.2d at 910 ("After the trial court has examined and ruled on the punitive damages award, the losing party may petition for appeal to this Court. In our review of the petition, we will consider all of the same factors that we require the jury and trial judge to consider ..."); *Pote v. Jarrell*, 412 S.E.2d 770, 777 (W. Va. 1991) ("[M]erely because error relating to a punitive award is asserted in the petition, that appeal will not automatically be granted on the punitive damage point alone.").

Petitioners cannot plead ignorance of these authorities. If petitioners believed that the Due Process Clause required the WV Supreme Court to accept their appeal for further review, then they were required to raise the issue below and afford the WV Supreme Court the opportunity to rule upon it.

Petitioners' failure to do so precludes them from raising the issue in this Court.

### 2. Due Process Does Not Require Appellate Review of Punitive Damage Awards

Petitioners contend that "[t]his Court's decisions establish a due–process right to appellate review of punitive–damages awards." Petition for a Writ of Certiorari (No. 08–217) at 2. This contention is inaccurate. The Court has consistently proclaimed, for nearly a century, that the Due Process Clause does not require a state to provide appellate review of its trial court's rulings. *M.L.B. v. S.L.J.*, 519 U.S. 102, 114 (1996) (Due Process Clause does not require states to provide appellate review of orders terminating parental rights); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review."); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit Cty.*, 281 U.S. 74, 80 (1930).

This Court's decisions involving punitive damage awards do not alter its long–standing position that states are not required to provide appellate review. In *Haslip*, the Court held only that Alabama's appellate review of punitive damage awards provided "an additional check" on the jury's discretion. *Haslip*, 499 U.S. at 20. Several of the concurring justices wrote separately, however, to underscore that the Court was not requiring—and

cannot require—other states to adopt Alabama's system of imposing punitive damages. *Id.* at 24–25 (Scalia, J., concurring) (ruling is limited to the constitutionality of Alabama's particular procedures as applied, which "provides no guidance as to whether any *other* procedures" would be constitutional); *id.* at 42 (Kennedy, J., concurring) ("We do not have the authority ... to alter the rules of common law respecting the proper standard for awarding punitive damages and the respective roles of the jury and the court in making that determination.").

In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Court held that Oregon's statute which prohibited any judicial review of punitive damage awards, "without providing any substitute procedure" to safeguard against a jury's bias in imposing punitive damages, was unconstitutional. *Id.* at 432. The Court did not require Oregon to provide appellate review. *Id.* Rather, it recognized that Oregon could satisfy due process by providing "substitute" procedures. *Id.*

Nearly a decade later, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court granted certiorari to resolve a split in the circuits as to the proper standard of appellate review of punitive damage awards imposed by federal district courts. *Id.* at 426, 431. While the Court held that circuit courts must provide a *de novo* review of punitive damage awards imposed by district courts, its ruling was not premised on constitutional principles applicable to state courts. *Id.* at 436. Even if it were, however, such a ruling

would still not require states to afford defendants a right to appeal such awards. In fact, this Court has held that appellate courts must apply a *de novo* standard of review to several types of rulings in criminal cases. *See United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (requiring *de novo* review of whether a criminal fine is excessive under the Eighth Amendment); *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (determinations of reasonable suspicion and probable cause must be reviewed *de novo* on appeal). Even after issuing these opinions, however, the Court reaffirmed that the Due Process Clause does not require states to provide any appellate review in criminal cases. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) ("The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions."). *Cooper* therefore leaves undisturbed the well–established principle that, even where punitive damages are awarded, civil litigants do not possess a constitutional right to appeal.

In short, this Court has unambiguously and repeatedly stated that the Due Process Clause does not require states to provide appellate review of trial court decisions. The Court has not held otherwise in its opinions addressing due process associated with the imposition of punitive damage awards. Petitioners' suggestion that the Court implicitly overturned nearly century–old pronouncements—by requiring that, if a federal appellate court reviews a punitive damage award, the review be *de novo*—is baseless.

### 3. In Any Event, the WV Supreme Court Provided a *De Novo* Review of the Punitive Damage Awards

Even if this Court were inclined to reconsider its decisions holding that civil litigants do not have a constitutional right to appeal, this case would not be an appropriate vehicle for doing so because the WV Supreme Court substantively reviewed the merits of the punitive damage awards when considering the petitioners' amended petitions. Like every other West Virginia defendant against whom punitive damages are awarded, petitioners were therefore afforded meaningful appellate review of those awards.

The WV Supreme Court has made it clear that, out of "concern that there be ... a meaningful adequate review" of punitive damage awards, it reviews punitive damage awards in the context of petitions for appeal. *Garnes*, 413 S.E.2d at 908–10. In *Garnes*, the WV Supreme Court expressly announced the procedure for appellate review of punitive damages in West Virginia. *Id.* A party challenging a punitive damage award must file a petition for appeal which (1) addresses with specificity each factor that the jury and trial court are permitted to consider and (2) summarizes the evidence presented to the jury or trial judge during the post–judgment review. *Id.* Petitioners must not simply advance policy or societal reasons for taking the appeal, but instead must specifically address the merits of the appeal (*i.e.*, whether punitive damages are proper and justified based on the trial evidence). *Id.; see also Alkire v. First Nat'l Bank of Parsons*,

475 S.E.2d 122, 130–31 (W. Va. 1996) ("*upon petition*, this Court will review the amount of the punitive damages award, applying the standard specified in ...*Garnes*") (emphasis added).

The WV Supreme Court revisited this standard in *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678 (W. Va. 1997). The WV Supreme Court concluded that the review process set forth in *Garnes* is consistent with this Court's guideposts in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and therefore should remain the proper standard for reviewing punitive damage awards. *Vandevender*, 490 S.E.2d at 692–93. The WV Supreme Court has also clarified that it applies a *de novo* review of the punitive damage award during the petition for appeal stage of the proceeding. *Boyd*, 608 S.E.2d at 176–77 ("As a preliminary matter, we note that our review of this issue is *de novo*.").

Petitioners are not the first litigants to challenge the constitutionality of West Virginia's system of appellate review. In other civil and criminal cases, defendants have asked courts—including this Court—to require West Virginia to modify its judicial system. In each instance, the courts refused to invalidate West Virginia's judicial system as unconstitutional.

For example, in *Billotti v. Legursky*, 975 F.2d 113, (4th Cir. 1992), a criminal defendant petitioned for a writ of habeas corpus in federal court when the WV Supreme Court refused his petition for appeal

challenging his murder conviction. *Id.* at 115.[6] The district court dismissed the petition and the Fourth Circuit affirmed, holding that West Virginia's judicial system did not violate the Due Process Clause. *Id.* at 115–16. The Fourth Circuit concluded that West Virginia afforded the defendant an adequate opportunity to challenge his conviction at the petition for appeal stage, and that—while West Virginia's judicial system differs from most other states' systems—it is not the federal court's role to determine which state's judicial system is "preferable." *Id.* at 116. The defendant petitioned for certiorari and this Court denied the petition. *See Billotti v. Legursky*, 507 U.S. 984 (1993).

This Court has also previously denied petitions for certiorari alleging that the WV Supreme Court should be required to grant petitions for appeal and provide further review of punitive damage awards. In *Mountain Enterprises, Inc. v. Fitch*, No. 03–1223, 2004 WL 367611 (U.S. Feb. 26, 2004), the petitioner urged this Court to grant review of a West Virginia punitive damages award and recognize a right to additional appellate review of such awards. *Id.* at *13. The Court denied the petition. *Mountain Enterprises, Inc. v. Fitch*, 541

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[6] In the underlying proceeding, the WV State Court rejected the contention that due process mandates that a defendant convicted of first–degree murder receive "full appellate review." *Billotti v. Dodrill*, 394 S.E.2d 32, 36–37 (W. Va. 1990). The WV Supreme Court concluded that its review of the petition for appeal constitutes appellate review, so the defendant's contention that he received no appellate review—the very same contention that petitions raise in this case—was unfounded. *Id.* at 40.

U.S. 989 (2004). In *Camden–Clark Memorial Hospital Corp. v. Boggs*, No. 07–812, 2007 WL 4458908 (U.S. Dec. 18, 2007), the petitioner made the very same arguments that petitioners herein advance—that this Court has implicitly ruled that the Due Process Clause requires more than appellate review of punitive damage awards at the petition for appeal stage. *Id.* at 8–12, 17–19. This Court denied the petition for certiorari only months ago. *Camden–Clark Memorial Hosp. Corp. v. Boggs*, 128 S. Ct. 2080 (2008).[7]

The Court should similarly deny the petitions in this case. The WV Supreme Court has unambiguously pronounced, in *Garnes* and its progeny, that it provides *de novo* review of punitive damage awards at the petition stage—including a review of the facts, evidence, and arguments addressing each factor that the jury and trial judge were required to consider. Each petitioner in this case was granted leave to exceed the 50–page limit applicable to petitions for appeal, and submitted separate amended petitions that specifically

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[7] Unlike petitioners in this case, the petitioners in *Mountain Enterprises* and *Camden–Clark* preserved the issue for appeal by arguing to the WV Supreme Court, in conjunction with their petitions for appeal, that the Due Process Clause of the Fourteenth Amendment required the WV Supreme Court to allow their appeals and provide further review. *See Mountain Enterprises*, 2004 WL 367611, at *9 (petitioner filed a motion for reconsideration with the WV Supreme Court arguing that the Due Process Clause required it to grant the petition); *Camden–Clark*, 2007 WL 4458908, at *6 (petitioner argued in its petition to the WV Supreme Court that the Due Process Clause required the WV Supreme Court to grant the petition).

addressed the factors and evidence that the jury and Trial Court considered in imposing the punitive damage awards. The WV Supreme Court received the entire trial record several months before petitioners filed their amended petitions and, therefore, had all of the evidence that was presented to the Trial Court. After conducting its *de novo* review, the WV Supreme Court determined that further review was unnecessary and refused the amended petition. Under these circumstances, there is no doubt that petitioners had a fair opportunity to present their allegations of error to the WV Supreme Court.

The fact that the WV Supreme Court elected not to provide any further review in this case, or issue a written opinion explaining the results of its review of the amended petitions, simply does not amount to a deprivation of due process.[8] This Court's role is not to micromanage state court systems or otherwise require unanimity among the states. The fact that other courts provide appellate review in a manner that differs from West Virginia (and Virginia) is irrelevant. It is not this Court's function to evaluate which state's system is better, fairer, or wiser. This Court's only role to determine whether West Virginia's system comports with the Due Process Clause. The WV Supreme Court's *de*

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[8] It is well established that the Due Process Clause does not require that courts issue written opinions that set forth in detail the bases for their findings. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464–65 (1993); *Black v. Romano*, 471 U.S. 606, 613–14 (1985); *Harris v. Rivera*, 454 U.S. 339, 345 & n.11 (1981); *Arizona v. Washington*, 434 U.S. 497, 516–17 (1978).

*novo* review of the facts and evidence at the petition stage unquestionably satisfies due process. Condemning the WV Supreme Court simply because it may perform appellate review on a petition for appeal is inconsistent with the substantial leeway that states enjoy "to define ... rules of criminal and civil procedure in a variety of different ways." *Danforth v. Minnesota*, 128 S. Ct. 1029, 1041 (2008).

### B. Certiorari is Not Warranted to Second Guess Justice Starcher's Decision Not to Recuse Himself Under the Unique Facts of this Case

This Court should also deny review of Justice Larry Starcher's decision not to recuse himself from this case. First, petitioners have waived the issue by failing to raise their federal due process challenge with the WV Supreme Court. Second, Justice Starcher's criticism of Massey's political involvement with the WV Supreme Court—and its attempt to influence the administration of justice—was entirely appropriate and did not demonstrate a bias against the company. Third, Justice Starcher did not acknowledge that his statements were evidence of bias, and his recusal in another case involving Massey (for other reasons) did not require his recusal in this case.

#### 1. Petitioners Have Not Preserved a Constitutional Challenge to Justice Starcher's Refusal to Recuse

Congress has empowered this Court to review only those state court decisions involving rights that

are "specially set up or claimed" under the Constitution or statutes of the United States. 28 U.S.C. § 1257(a)(2007); *Howell v. Mississippi*, 543 U.S. 440, 443 (2005). The petitioner bears the burden of demonstrating to this Court that it presented the federal issue to the state court with fair precision. *Adams v. Robertson*, 520 U.S. 83, 86–87 (1997) ("we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."); *Webb v. Webb*, 451 U.S. 493, 499 (1981).

This Court has repeatedly held that general references in state court pleadings to certain rights that are available under the United States Constitution, including references to "due process," are insufficient to properly present a federal claim. *Adams*, 520 U.S. at 88–89 & n.3 (passing references to "due process," which could have referred to rights under the federal or Alabama Constitution, did not clearly present a federal claim); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77–78 (1988) (general reference to punitive damage award as violating constitutional principles did not make it clear that petitioner was alleging a violation of the Due Process Clause of the Fourteenth Amendment); *Webb*, 451 U.S. at 496 (references to "full faith and credit," without citing to the Federal Constitution or to cases relying upon it, did not clearly assert a federal claim). The federal claim must be addressed specifically in the state court pleadings so that "there should be no doubt from the record that a claim under *federal* statute or the *Federal*

Constitution was presented in the state courts." *Webb*, 451 U.S. at 501.

Petitioners did not raise a federal issue in the WV Supreme Court in conjunction with their requests that Justice Starcher recuse himself. In the introductory paragraph of their Joint Motion to Recuse the Honorable Larry Starcher, and throughout the ensuing twelve numbered paragraphs, petitioners repeatedly invoked Rule 29 of the West Virginia Rules of Appellate Procedure and Canon 3(E)(1)(a) of the West Virginia Code of Judicial Conduct as the legal basis for their recusal request. Nowhere did petitioners cite or otherwise refer to the Fourteenth Amendment of the United States Constitution. Indeed, they made only one passing reference to due process in general, stating that the "underlying rationale for disqualification is based on principles of due process." Petitioners then cited to a West Virginia state–law case—*Louk v. Haynes*, 223 S.E.2d 780 (W. Va. 1976)—as the basis for their assertion.

Petitioners' subsequent filings further establish that their claims were based exclusively on state law. Petitioners filed a Renewed Joint Motion to Recuse the Honorable Larry Starcher on approximately March 8, 2008 and a third filing, entitled Petitioners' Joint Submission in Support of their Renewed Motion to Recuse the Honorable Larry Starcher, just a few weeks later on March 28, 2008. In each, petitioners argued that Justice Starcher's purported comments about Massey constituted grounds for recusal "in accordance with the mandates of Rule 29 of the West Virginia Rules

of Appellate Procedure and Canon 3E of the West Virginia Code of Judicial Conduct." Finally, petitioners filed a Second Joint Submission in Supplementation of their Renewed Motion to Recuse the Honorable Larry Starcher on or around April 4, 2008. Petitioners also repeatedly referred to Rule 29 and Canon 3 in this 8–paragraph submission. Nowhere in any of these filings did petitioners argue that Justice Starcher's failure to recuse himself would violate the Due Process Clause or any other provision of the Untied States Constitution.

Because petitioners did not argue that the Due Process Clause of the Fourteenth Amendment required Justice Starcher to recuse himself, this Court lacks jurisdiction to consider this issue.

### 2. Certiorari is Not Warranted to Apply Well–Established Law on Bias to Justice Starcher's Comments About Massey's Efforts to Influence the WV Supreme Court

The highly–unique facts surrounding the motion to recuse Justice Starcher in this case—including the political activities of Massey and Mr. Blankenship undertaken to influence the composition of the WV Supreme Court, Justice Starcher's criticism of those efforts, the public perception of the entire WV Supreme Court, and the Justices' action (or inaction) to address that perception—render this case inappropriate for certiorari. The case does not involve a conflict among federal courts or between a federal court and a state court regarding a federal issue. *See* S. Ct.

Rule 10(a)(2008). It does not involve a conflict among the state courts of last resort regarding an important federal issue. *Id.* at 10(b). It does not involve an important federal question that has not been, but should be, settled by this Court. *Id.* at 10(c). This case involves nothing more than petitioners' assertion that Justice Starcher misapplied well–established recusal law in the highly unique facts of this particular case.

Ironically, the amicus brief filed by the National Mining Association ("NMA") succinctly summarizes the reason that this Court should not review Justice Starcher's recusal analysis. The NMA correctly states that "this Court's charge is not to sit as a court of error correction; the Court 'rarely' grants certiorari 'where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.' S. Ct. Rule 10. This Court takes up cases to articulate or explicate a legal rule; trial courts and courts of appeals apply those rules to each case's facts and circumstances." Brief Amicus Curiae of the National Mining Association in Support of Petitioners, p. 7. Petitioners do not ask this Court to articulate or explicate the law regarding recusal based on statements evidencing bias. That law is well established. Instead, petitioners ask this Court to correct Justice Starcher's purported misapplication of that law to the unique factual circumstances of this case. The Court should not grant certiorari for this purpose and sit as a court of error correction.

Furthermore, Justice Starcher's criticism of Massey's conduct did not require his recusal under

well–established law on bias. The fact that a judge publicly disapproves of a party's conduct generally does not require the judge's recusal in cases involving that party. As one Circuit Court has explained:

> [T]he negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair–minded person could not entirely set aside when judging certain persons or causes. It is an animus more active and deep–rooted than an attitude of disapproval towards certain persons because of their known conduct, unless the attitude is somehow related also to suspect or invidious motive such as racial bias or a dangerous link such as a financial interest, and only the slightest indication of the appearance or fact of bias or prejudice arising from these sources would be sufficient to disqualify.

*United States v. Conforte*, 624 F.2d 869, 881 (9th Cir. 1980). Extrajudicial comments only establish bias if they "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *Christo v. Padgett*, 223 F.3d 1324, 1333–34 (11th Cir. 2000); *see also United States v. Salemme*, 164 F. Supp.2d 86, 105 (D. Mass. 1998) ("judges are usually

longstanding members of the community in which they serve and although they will inevitably encounter witnesses with whom they, or people close to them, have had positive or negative experiences, judges can and will ordinarily ignore those experiences and decide the matters before them impartially.").[9]

The Ninth Circuit's ruling in *Conforte* is particularly instructive. Following a bench trial in that case, the defendants were convicted of tax evasion in conjunction with their operation of a legalized house of prostitution in Nevada. *Conforte*, 624 F.2d at 873. The defendants asserted that the trial judge was biased, and should have been disqualified, because he had previously (1) advised the University of Nevada not to accept contributions from defendants because they were "not good for Reno" and (2) rejected defendants' application for membership in the American Contract Bridge League's Reno United when the judge was serving as its president. *Id.* at 878–79. The Ninth Circuit concluded that the trial judge's disapproval of the defendants' conduct, in operating a brothel, did not establish such a deep–rooted animus against them that required his disqualification—even though the case was a bench trial involving the operation of the brothel, the very conduct that the judge criticized. *Id.* at 881.

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[9] West Virginia applies the same standard for evaluating potential bias. *Taylor Cty. Comm'n v. Spencer*, 285 S.E.2d 656, 664 (W. Va. 1981) (judge's comments that unfavorably compared the court's facilities to those of the county commissioners did not establish a bias that required him to recuse himself from a case involving the county commission).

In this case, petitioners mischaracterize Justice Starcher's comments by ignoring their context and arguing that they demonstrate "personal antagonism" against Massey and Mr. Blankenship. Petitioners overlook the fact that Justice Starcher's comments pertain to well known and highly–publicized efforts by Massey and Mr. Blankenship to elect new justices to the WV Supreme Court. In particular, 10 of the 11 comments that petitioners identified as evidence of bias in their original motion seeking Justice Starcher's recusal involved Justice Starcher's comments on very specific behavior of which he disapproved. Justice Starcher disapproved of Massey's attempts to exert influence over the WV Supreme Court, including Mr. Blankenship's vacation with one of the justices while cases involving Massey were pending, and Mr. Blankenship's staggering financial contributions in order to elect another justice that he favored. When viewed in the proper context, Justice Starcher's comments do not suggest that he harbors a deep–rooted, personal aversion or animus against Massey or Mr. Blankenship. His comments instead suggest that Justice Starcher disapproved of their efforts to exert an undue influence over the WV Supreme Court.

Because judges have unique knowledge and perspective involving issues that affect the administration of justice, ethical rules governing their conduct permit—and indeed encourage—them to comment on those issues. *See* West Virginia Canons of Judicial Conduct, Canon 4B, cmt. (2008) ("As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute

to the improvement of the law, the legal system, and the administration of justice ..."); *Scott v. Flowers*, 910 F.2d 201, 211 (5th Cir. 1990) (reversing sanctions imposed upon a judge because his criticisms "dealt with the administration of the county justice system by county officials, a matter about which Scott, as an elected judge from that county, was likely to have well–informed opinions.").

Thus, although Justice Starcher was critical of Massey's and Mr. Blankenship's attempts to influence the administration of justice, his disapproval of those political activities does not evidence a deep–rooted and personal bias. Justice Starcher was therefore not constitutionally required to recuse himself in all cases involving Massey, particularly in cases—like this one—in which the political efforts of Massey and Mr. Blankenship are not at issue.

### 3. Petitioners' Reliance Upon Justice Starcher's Recusal in a Different Case Involving Massey is Misguided

Petitioners' recusal argument rests, in significant part, upon the fact that Justice Starcher recused himself from a different case involving Massey in the past. Their reliance upon Justice Starcher's conduct in another case is legally and factually misguided.

From a legal standpoint, the lower courts are in agreement that a judge's decisions to recuse in a particular case does not require recusal in a

subsequent case involving the same party. *United States v. Merkt*, 794 F.2d 950, 960 (5th Cir. 1986) ("Judge Vela's disqualification was not required ... merely because he voluntarily withdrew from another case in which Elder was the defendant."); *In re Webster*, 382 F.2d 79, 84 (9th Cir. 1967) (fact that the judge recused himself in response to a similar motion in a different case is irrelevant and does not constitute an admission of bias); *Person v. General Motors Corp.*, 730 F. Supp. 516, 519 (W.D.N.Y. 1990) ("the fact that I recused myself from [an earlier case] does not mandate that I must recuse myself from the present case.").[10] As the Ninth Circuit has explained, a judge's decision to recuse is not an admission of bias:

> The fact that the judge, in response to a similar motion, disqualified himself in [earlier litigation], is immaterial. The judge may have then thought that, although not personally biased, certain of his remarks may have given Webster cause to believe that the judge was, for

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[10] State courts, including those in West Virginia, have similarly held that a judge's recusal in one case does not require subsequent recusals in cases involving the same party or issues. *In re Disqualification of Martin*, 657 N.E.2d 1334, 1334 (Ohio 1990) ("The voluntary recusal by a judge from an earlier case does not by itself support the judge's disqualification from another unrelated case involving the same party."); *Spencer*, 285 S.E.2d at 663–64 (rejecting argument that circuit court judge had admitted bias by previously disqualifying himself from a prior case involving the county commission, and therefore was required to recuse himself in subsequent cases involving the commission).

> the moment, somewhat less than objective in his consideration of Webster's argument. A judge who, out of an abundance of caution and a sincere desire to provide a fair hearing, takes such means to withdraw from a particular case, is not thereby committed to a consistent course of recusing himself in all subsequent cases involving the same party.

*Webster*, 382 F.2d at 84; *see also Person* 730 F. Supp. at 519 ("My decision to recuse myself [in a prior case] was neither an acknowledgment of the legal sufficiency of counsel's motion in that case, nor a suggestion that I would not be able to act without bias or prejudice in future cases involving him."). In fact, judges sometimes disqualify themselves for reasons other than those set forth in a party's motion for recusal. *Merkt*, 794 F.2d at 960 (rejecting argument that judge's disqualification in a prior action constituted an admission of bias because, in that prior action, the judge's recusal order stated that the recusal was based on other reasons).

From a factual standpoint, Justice Starcher (like the judge in *Merkt*) expressly stated in recusing himself from the prior matter—*Caperton v. A.T. Massey Coal Co.*—that his reason for doing so *was not* because he was biased against Massey. On the contrary, Justice Starcher stated that he voluntarily reconsidered his prior decision not to recuse himself because of the public revelation that another member of the WV Supreme Court, Justice Elliot Maynard, had been engaged in secret and improper

dealings with Massey that had caused the public to scrutinize *all* of the Justices' relationships with Massey in a far different light. *See* Opinion in *Caperton* dated February 15, 2008. Justice Starcher explained in his 10–page opinion in *Caperton* that he was not "reversing" his prior decision as incorrectly made and, in fact, had properly refused to recuse himself from numerous cases involving Massey in the past because his public comments did not create the appearance that he could not be fair. *Id.* at pp. 1–2.

Justice Starcher recognized, however, that the recent developments involving Justice Maynard had at least temporarily changed the landscape in which the public viewed Massey's interactions with and influence over *all* members of the WV Supreme Court. *Id.* at pp. 3–4. Because these developments resulted in the case taking on "enormous public proportions," Justice Starcher recused himself in *Caperton* in an attempt to help restore confidence in the WV Supreme Court and its ability to fairly adjudicate disputes involving Massey. He simultaneously implored a third member of the WV Supreme Court, Justice Brent Benjamin, to recuse himself in light of the public outcry resulting from the fact that Mr. Blankenship had spent $3 million to assure Justice Benjamin's election to the WV Supreme Court. *Id.* at pp. 4–7.

When petitioners subsequently moved to recuse Justice Starcher in this case, the circumstances had changed. Justice Starcher therefore no longer believed that his recusal would be beneficial to the judicial system. Because Justice

Starcher was not biased, and was not obligated to recuse, he properly declined to recuse himself in this case. Petitioners' contention that he was obligated to do so because he recused himself in *Caperton* is baseless.

### C. Certiorari is Not Warranted to Review the Trial Court's 32–Paragraph Findings of Fact and Conclusions of Law Upholding the Punitive Damage Awards

Petitioners' attack on the punitive damage awards, in a separate petition (08–218), is based entirely on a profound mischaracterization of the Trial Court's review of those awards. Petitioners argue that the Trial Court "rubber stamped" the punitive damage awards by "baldly" stating that (1) petitioners' conduct was reprehensible and (2) the punitive damage awards do not exceed the compensatory damages. *See* Petition for a Writ of Certiorari (No. 08–218) at i and 19–20. Nothing could be further from the truth.

First, the record below establishes that the Trial Court performed an exhaustive review of the punitive damage awards. The Trial Court received and reviewed lengthy post–trial briefs, including petitioners' 27–page brief in which they argued that the punitive damage awards were not justified. The Trial Court also entertained oral argument on the appropriateness of the punitive damage awards. Finally, the Trial Court entered a lengthy opinion, containing 32 separate findings of fact and conclusions of law that served as the bases for its conclusion that the punitive damage awards were

proper. Under these circumstances, petitioners' contention that the Trial Court merely "rubber stamped" the jury's punitive damage awards is specious.

Second, the Trial Court's description of petitioners' conduct involved far more than making a "bald statement" that petitioners' conduct was reprehensible. The Trial Court expressly identified a number of the facts that made petitioners' conduct particularly reprehensible. The Trial Court also stated that the substantial costs of prosecuting the case, which required a massive amount of discovery and a five–week trial further supported the punitive damage awards. The Trial Court clearly did not simply assert that petitioners' conduct was reprehensible, but instead provided a reasoned explanation for its conclusion that petitioners' conduct was so reprehensible that it justified the punitive damage awards.

Third, the Trial Court's extensive analysis in its opinion disproves petitioners' assertion that the Trial Court "treated a low ratio of punitive to compensatory damages as a safe harbor, upholding [the] multi–million–dollar punitive awards without regard to the reprehensibility of the conduct." The ratio of punitive to compensatory damages—the second of the three guideposts set forth in *BMW*—is unquestionably one of the most critical factors in the review of a punitive damage award. The Trial Court properly considered this factor, noting that the punitive damage awards bore a reasonable relationship to the compensatory damages caused and awarded, and that the punitive damage awards

*when combined together* are still less than the compensatory damage award.[11] This analysis, combined with the 31 additional paragraphs detailing the Trial Court's other grounds for upholding the punitive damage awards, conclusively demonstrates that the Trial Court did not simply "rubber stamp" the punitive damage awards because they were merely 42% of the compensatory damage award.

Finally, while petitioners contend that granting certiorari would provide lower courts with "needed guidance," they do not set forth the nature of the guidance that they seek. Petitioners are not seeking to modify or supplement the *BMW* guideposts that lower courts are to consider. Nor are they asking the Court to rule that lower courts are prohibited from considering a particular type or category of evidence in applying the *BMW* factors. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 421–22 (2003) (holding that a defendant's misconduct that is dissimilar to the conduct giving rise to the claim and harm suffered by the plaintiff cannot serve as the basis for punitive damages); *BMW*, 517 U.S. at 572–73 (holding that lawful out–of–state conduct that does not have an impact on the state or its residents cannot serve as a basis for punitive damages). Petitioners do not take issue with the application of the *BMW* factors in a manner that transcends this case and would

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[11] In this instance, the ratio was remarkably low. The $50 million punitive damage award imposed against each petitioner was only 0.42 times the nearly $120 million in compensatory damages.

establish a new legal proposition generally applicable to future punitive damage cases. They argue instead that the Trial Court must have misapplied the *BMW* factors because it found the punitive damage awards to be warranted. Though cloaked as a request that this Court provide guidance to lower courts, petitioners in reality simply disagree with the Trial Court's application of those well–established factors to the facts of this case.

This Court is not a court of error correction. A properly–instructed jury imposed the punitive damage awards in this case after a five–week trial. While petitioners are entitled to believe that that the jury, the Trial Court, and the WV Supreme Court were all incorrect, they are not entitled to a third attempt to convince a tribunal that the jury was wrong.

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

Dated: October 22, 2008

# APPENDIX

# APPENDIX A

CASE 05-C-85 BROOKE

WHEELING PITTSBURGH STEEL CORP vs.
CENTRAL WEST VIRGINIA ENERGY C

| LINE | DATE | ACTION |
|---|---|---|
| 1 | 04/27/05 | CASE FILED |
| 2 | | CIVIL CASE SHEET |
| 3 | | COMPL WITH EX "A" ATTACHED |
| 4 | | SUMM,COMPL & NOTICE OF SERVICE ISSUED & SENT TO SOS FOR |
| 5 | | SERVICE ON CENTRAL WV ENERGY CO. |
| 6 | | NOTICE OF SERVICE BY FIRST CLASS MAIL |
| 7 | | FILE COPY OF SUMMONS. |
| 8 | 05/07/05 | SUM/COMP RTRND BY SS. ACPTD SRV FOR CENTARL WV ENERGY, 4/28/05 |
| 9 | | CM RTRN CARD FOR CEANTRAL WV ENERGY BY H. BURFORD, 5/2/05 |
| 10 | 05/12/05 | COS OF PLTF'S 1ST REQST FOR PROD OF DOC |
| 11 | | MOT FOR ADMNS PRO HAC VICE/COS E. EXS |
| 12 | | ORD ADMTNG DAVID B FAWCETT & GREGORY J KROCK PRO HAD VICE IN |

| | | |
|---|---|---|
| 13 | | CV BK 70 PG 741 |
| 14 | 05/17/05 | MOT FOR ORD AUTHORIZING ISSURANCE OF SUBP DUCES TECUM DIR TO |
| 15 | | KINDER MORGAN BULK TERMINALS |
| 16 | | ORD AUTHORIZING ISSUANCE OF SUPB DUCES TECUM IN CV BK 70 PG 751 |
| 17 | 06/01/05 | NOT OF REMOVAL BY DEF, CENTRAL WV ENERGY CO/COS |
| 18 | 09/01/05 | FED ORD GRNTNG PLF'S MOT TO REMAND & DENYNG MOT TO TRANFER VENUE |
| 19 | | AS MOOT |
| 20 | | CV DOCKET FROM DISTRICT COURT |

* * *

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|---|---|---|
| 860 | 09/04/07 | ORD DENYING DEF'S MOT & MEMO FOR JDGMNT AS A MATTER OF LAW OR IN |
| 861 | | ALT, A NEW TRIAL ON THE BREACH OF CONTRACT CLM IN CV BK 76 |
| 862 | | PG 138 |
| 863 | | ORD DENYING PLTF MTN ST CARBON'S MOT TO AMEND FINDINGS AND/OR |
| 864 | | FOR NEW TRIAL ON SUPLMNTL CNTRCLM IN CV BK 76 PG 139 |
| 865 | | ORD DENYING DEFS' JOINT |

| | | |
|---|---|---|
| | | MOT FOR JDGMNT AS A MATTER OF LAW OR IN |
| 866 | | ALT, A NEW TRIAL BASED UPON THE JURY'S RTRN OF THE VERDICT IN |
| 867 | | CV BK 76 PG 140 |
| 86 | 09/13/07 | TRANSCRIPT OF PROCEEDINGS HELD ON 7/30/07 |
| 869 | 09/25/07 | DEFS' JOINT RSPNS TO PLTFS' MOT PURSUANT TO WVRCP 62 FOR AN ORD |
| 870 | | REQUIRING DEFS T OPOST TWO BONDS/COS |
| 871 | 10/25/07 | ORD OF 9/28/07 WITH CPY OF SURETY BOND FORM AS EX 1 IN CV BK 76 |
| 872 | | PG 386-389 |
| 873 | | DEFS' TENDER OF JOINT APPEAL BOND/COS |
| 874 | | DEFS' JOINT APPEAL BOND |
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No. 08-218

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# In the Supreme Court of the United States

MASSEY ENERGY COMPANY AND CENTRAL WEST VIRGINIA ENERGY COMPANY,

*Petitioners,*

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON, LLC,

*Respondents.*

**On Petition for a Writ of Certiorari to The Supreme Court of Appeals of West Virginia**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

Respondents offer no persuasive reason why this Court should not decide whether it violates due process to require petitioners to pay nearly a quarter of a billion dollars in compensatory and punitive damages when (1) petitioners received no appellate review of the award and (2) a judge with an actual bias against petitioners participated in the decision to deny appellate review.[1]

### I. REVIEW IS WARRANTED ON THE RIGHT-TO-APPEAL QUESTION.

A. Contrary to respondents' contention (Opp. 12-14), petitioners have not forfeited their claim that they have a due-process right to an appeal.

Petitioners had no obligation to raise the claim in their petition for appeal, because the constitutional violation did not occur until the Supreme Court of Appeals denied the petition. In that respect, this case is like *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U.S. 74 (1930), in which this Court addressed a claim that had not been raised before the issuance of the state-court decision under review. The claim there was a constitutional challenge to a provision that no law could be declared unconstitutional without the concurrence of at least six of the seven members of the state supreme court. The decision under review affirmed a lower-court decision that a law was constitutional, even though five members of the state supreme court believed that the law was *un*constitutional. This Court decided the

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[1] Petitioners' previous Rule 29.6 Statement remains accurate, except that, as of September 30, 2008, no publicly held company owns 10% or more of Massey's stock.

claim on the merits because "the point could not have been taken earlier, as in advance of the affirmance on a vote of the minority the question would have been speculative." *Id.* at 79. So too here, in advance of the denial of the appeal—which, we might add, was quite unexpected, given the magnitude of the judgment and the substantiality of the appellate issues—the question whether there is a due-process right to an appeal would have been speculative.

When, as here, the constitutional violation does not arise until the appellate court's decision is issued, the petitioner is sometimes able to raise the claim in a petition for rehearing. That was true, for example, in *Bryant*. See 281 U.S. at 77. But West Virginia's rules do not authorize a petition for rehearing when the decision at issue is the denial of a petition for appeal. See W. Va. R. App. P. 24(a) (petition for rehearing may be filed after "the entry of judgment" and must state "the points of law or fact which * * * the Court has overlooked or misapprehended"). The rules do authorize a petitioner to "renew the petition [for appeal] as many times as he desires during the period prescribed by law for presentation of petitions." W. Va. R. App. P. 7(a). But that period had expired by the time the petition here was denied. This is therefore a case in which the state court "[will not] entertain a petition for rehearing and the federal question can be raised in no other way than through the papers addressed to [this] Court." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 3.18, at 196 (9th ed. 2007); see *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917).[2]

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[2] *Herndon* v. *Georgia*, 295 U.S. 441 (1935), on which respondents rely (Opp. 12-13), is distinguishable. The asserted consti-

Even if petitioners were required to raise the claim in the court below, however, that requirement was satisfied. In its petition for appeal, Massey argued that, "to guarantee the due process rights of the appellant," the court was required to make "a de novo determination" of whether a punitive award was justified and, if the court found that it was, "a de novo review" of the size of the award. Massey Amended Pet. for Appeal 21. Because an appellate court cannot provide *de novo* review if it does not provide *any* review, the language quoted above adequately raised the claim that petitioners have a due-process right to appellate review of the punitive-damages award. "Though inexplicit, * * * the due process [right-to-appeal] issue [was] within the clear intendment of [petitioners'] contention and * * * such issue [is therefore] sufficiently presented." *Braniff Airways, Inc.* v. *Nebraska Bd. of Equalization*, 347 U.S. 590, 599 (1954).

B. Respondents are also mistaken in contending (Opp. 14-16) that there is no constitutional right to an appeal of substantial damages awards.

The brief in opposition offers no response at all to most of the arguments in the petition and the supporting amicus briefs. For example, respondents do not dispute that there is a right to appeal under each of the due-process methodologies employed by this Court—contemporary practice (see Pet. 17-18), historical practice (see Pet. 18-20; Law Professors Amicus Br. 2-9), and the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (see Pet. 20 n.5). Nor do respondents take issue with the proposition

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tutional violation there occurred in the trial court, not the state supreme court, and the petitioner failed to challenge the violation on appeal to the state supreme court.

that due process requires consistent and reasonably predictable outcomes, which are impossible without rigorous appellate review of jury awards. See Nat'l Mining Ass'n Amicus Br. 3-15. Finally, respondents do not deny that the question whether there is a right to appellate review is nowhere more important than in West Virginia, which has the most toxic litigation climate of any of the fifty States. See Pet. 24-26; Am. Chemistry Council Amicus Br. 13-18.

Instead, respondents contend that this Court "has consistently proclaimed * * * that the Due Process Clause does not require a state to provide appellate review of its trial court's rulings." Opp. 14. Like statements to the same effect in some of the Court's criminal cases, however, the statements in the civil cases cited by respondents (*ibid.*) are dicta. In each of those cases, the State *did* provide the right to an appeal; the issue was whether the State discriminated in doing so.

In addition to demonstrating that there is a right to appellate review of substantial damages awards under this Court's due-process methodologies, the petition shows (at 13-17) that a right to appeal is recognized in the Court's punitive-damages decisions. In arguing otherwise, respondents challenge the notion that, because this Court has recognized a due-process entitlement to *de novo* appellate review of punitive awards, there is a due-process requirement that there *be* appellate review of such awards. See Pet. 15-17. Respondents rely on the fact that this Court has "held that appellate courts must apply a *de novo* standard of review to several types of rulings in criminal cases" even as it has "reaffirmed that the Due Process Clause does not require states to provide any appellate review in criminal cases."

Opp. 16. But the decisions cited by respondents that require *de novo* review are federal cases (*ibid.*), in which a criminal defendant has a statutory right to an appeal. The decisions therefore do not contemplate, much less establish, a right to *de novo* appellate review without any right to appeal. In any event, as the petition explains (at 21-22), statements in this Court's decisions that there is no due-process right to an appeal in a criminal case are dicta that likely would not be followed if the question were given plenary consideration.

C. Respondents are also mistaken in contending (Opp. 17-18, 20-22) that West Virginia affords constitutionally adequate appellate review of substantial damages awards.

Respondents' premise is that the Supreme Court of Appeals reviews punitive awards at the petition stage. It is hardly clear, however, that such a procedure was contemplated by *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1992), the case on which respondents rely (Opp. 17-18, 20). The relevant language in Syllabus Point 5 of that decision[3]—"[u]pon petition, this Court will review all punitive damages awards"—could be, and has been, interpreted to mean that the Supreme Court of Appeals will grant plenary review in all punitive-damages cases in which a petition is filed. See, *e.g.*, George N. Stewart & Dora A. DeCourcy, *West Virginia*, in PUNITIVE DAMAGES IN COMMERCIAL TRANSPORTATION: A STATE BY STATE SUMMARY 52 (Edgar M. Elliott, IV & Andrew T. Stephenson eds. 2007). If that is what the

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[3] In West Virginia, "new points of law" are "articulated through syllabus points." *Walker* v. *Doe*, 558 S.E.2d 290, 296 (W. Va. 2001).

Supreme Court of Appeals meant in *Garnes*, it obviously no longer follows that practice.

Even if the court did mean that review of punitive awards would occur at the petition stage, however, such review falls far short of the "[e]xacting appellate review" required by the Constitution. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003). Petition-stage review differs from plenary review in at least two critical respects. First, the Supreme Court of Appeals ordinarily denies a petition for appeal without full briefing, without the full trial record, and without oral argument. Compare W. Va. R. App. P. 3-5 with W. Va. R. App. P. 8-12. Second, if the court denies a petition for appeal, it almost never prepares an opinion providing its reasons. Such a decision—typically, as in this case, a one-line order—"is not an adjudication on the merits and does not carry any implication of approval of the judgment sought to be reviewed," *Triggs* v. *Berkeley County Bd. of Educ.*, 425 S.E.2d 111, 117 n.9 (W. Va. 1992), unless—unlike in this case—the order denying review indicates that the petition has been "rejected because the lower court's judgment or order is plainly right," *State ex rel. Miller* v. *Stone*, 607 S.E.2d 485, 488 n.3 (W. Va. 2004) (per curium) (internal quotation marks omitted). Reviewing a punitive award only at the petition stage, therefore, would not only deprive the petitioner of the careful scrutiny required by the Constitution, it would prevent the court from "clarify[ing]" the applicable legal principles, *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (internal quotation marks omitted), and thereby undermine the fundamental due-process requirement that "a person receive fair notice * * * of the conduct that will subject him to punishment * * * [and] the severity of the

penalty that a State may impose," *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996).

D. This Court has previously denied certiorari in two cases from West Virginia presenting the question of whether there is a due-process right to appellate review of punitive awards. See *Mountain Enters., Inc.* v. *Fitch*, 541 U.S. 989 (2004); *Camden-Clark Hosp. Corp.* v. *Boggs*, 128 S. Ct. 2080 (2008). But the denial of certiorari in those cases, is not, as respondents contend (Opp. 18-20), a reason to deny certiorari in this case.

First, unlike the petition here (at 18-20), the petitions there did not describe the historical evidence supporting a right to appellate review. That evidence is critical to a proper resolution of the question, particularly in light of this Court's heavy reliance on historical evidence in holding that there is a due-process right to judicial review of punitive awards in *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994).

Second, unlike the damages awarded here, which total nearly a quarter of a billion dollars, the total damages awarded there were relatively modest—less than $20 million in *Mountain Enterprises* (see 03-1223 Pet. 8) and less than $5 million in *Camden-Clark* (see 07-812 Pet. 6). In light of the size of those awards, the absence of appellate review in West Virginia may have been perceived to be an insufficiently serious problem to justify this Court's intervention.

Subsequent events demonstrate that that is no longer true. On May 22 of this year, the West Virginia Supreme Court of Appeals not only denied review of a judgment of more than $200 million in this case, but also denied review of a judgment of ap-

proximately $400 million in the *Tawney* case. See *Estate of Tawney* v. *Columbia Natural Resources*, LLC, No. 32966 (W. Va. May 22, 2008). Those verdicts were two of the seven largest in the Nation in 2007. See Pet. 24-25. If it was not previously clear that the question presented here is ripe for resolution, therefore, it is surely clear now. There is a pressing need to decide whether a State may require a citizen to pay a jury's award of hundreds of millions of dollars in compensatory and punitive damages when the award has been reviewed by a single, locally elected trial-court judge—and by no one else.

## II. REVIEW IS WARRANTED ON THE RECUSAL QUESTION.

A. Contrary to respondents' contention (Opp. 22-25), petitioners' recusal claim is properly before this Court. A federal question may be considered by the Court if the question was either "presented" to the state court *or* "addressed" by it. *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam). The question whether Justice Starcher's recusal is required by the Due Process Clause of the Fourteenth Amendment was both presented *and* addressed below.

In their initial motion to recuse, petitioners argued that "[t]he underlying rationale for disqualification is based on principles of due process." Joint Mot. to Recuse 3. In a supplement to their renewed motion to recuse, petitioners likewise argued that a refusal by Justice Starcher to recuse himself "would constitute a violation of * * * the constitutional right of Massey and Central West Virginia to have their case heard by an impartial and unbiased tribunal." 2d Joint Submission in Supplementation of Renewed Joint Mot. to Recuse 4.

Respondents claim that that was insufficient, because it is not clear that the argument was based on the United States rather than the West Virginia Constitution. Opp. 23-25. In fact, it is perfectly clear that the argument was based on the United States Constitution. Immediately after the first statement quoted above, the recusal motion quoted at length a decision of the West Virginia Supreme Court of Appeals that in turn quoted this Court's decision in *In re Murchison*, 349 U.S. 133 (1955), one of the principal cases on which we rely in the petition (see Pet. 26-27). Part of the language in *Murchison* quoted in the motion was that "[a] fair trial in a fair tribunal is a basic requirement of due process"; that "[f]airness of course requires an absence of actual bias in the trial of cases"; and that "no man is permitted to try cases where he has an interest in the outcome." Joint Mot. to Recuse 3 (quoting *State ex rel. Brown* v. *Dietrick*, 444 S.E.2d 47, 51 (W. Va. 1994), in turn quoting *Murchison*, 349 U.S. at 136). The due process at issue in *Murchison* was obviously *federal* due process.

In any event, Justice Starcher addressed the federal constitutional issue in denying the motion to recuse. In the penultimate paragraph of his opinion, he "challenge[d] all parties to read United States Supreme Court cases such as *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) and *In re Murchison*, 349 U.S. 133 (1955)." Pet. App. 18a. *Aetna*, like *Murchison*, addresses when a judge's recusal is required under the Fourteenth Amendment. See Pet. 27. Justice Starcher's opinion went on to say that, "[i]f my decision to participate in the instant case can be argued to create due process problems of constitutional dimension, so be it." Pet. App. 18a. Justice Starcher thus considered whether he was obligated

to recuse himself as a matter of federal constitutional law and decided that he would not recuse. That is sufficient to place the recusal question before this Court.

B. Respondents are also mistaken in contending (Opp. 25-26) that there is no conflict in authority on the question. In fact, the recusal issue implicates two separate conflicts. First, as the petition explains (at 26-29), Justice Starcher's refusal to recuse himself despite his deep-seated animosity towards Massey is patently inconsistent with this Court's due-process decisions on judicial bias. See Sup. Ct. R. 10(c) (certiorari may be granted when the decision below "conflicts with relevant decisions of this Court"). Second, as the petition also explains (at 30-32), this case provides the Court with an opportunity to resolve the question that was left open in *Aetna* and has divided federal courts of appeals and state courts of last resort: whether a biased appellate judge must cast the deciding vote in order for the party objecting to the judge's participation to obtain relief.

C. Respondents are mistaken, finally, in contending (Opp. 26-34) that Justice Starcher's recusal was not constitutionally required. This is not a case, as respondents suggest, in which a judge has merely exercised his right to comment on issues affecting the administration of justice (Opp. 29-30) by "publicly disapprov[ing] of a party's conduct" (Opp. 27). The persistence and truculence of Justice Starcher's attacks (see Pet. 5-7, 28) take them far from the realm of permissible public comment and demonstrate beyond any conceivable doubt that he was ac-

tually biased against Massey.[4]

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2008

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[4] *United States* v. *Conforte*, 624 F.2d 869 (9th Cir. 1980), on which respondents rely (Opp. 27-28), provides no support for their position. *Conforte* rejected the claim that a trial judge was required to recuse himself in a criminal case because, at a cocktail party years earlier, he had advised that a college football team reject contributions from the defendant, who ran a brothel and was a twice-convicted felon. The court found it "reasonable to expect a judge to advise against involving educational institutions with brothel owners or felons" and did "not think that because of this advice the judge was unable to give the defendant a fair trial." 624 F.2d at 881. The isolated, private, long-past, and measured statement in *Conforte* bears no resemblance to the repeated, public, still-current, and vitriolic attacks here.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

**Nos. 08-219, 08-229**

NISOURCE INC, ET AL.,

*Petitioners,*

v.

ESTATE OF GARRISON G. TAWNEY BY LELA ANN GOFF, EXECUTRIX, ET AL.,

*Respondents.*

**ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AND CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA, RESPECTIVELY**

**Nos. 08-218, 08-217**

MASSEY ENERGY COMPANY AND CENTRAL WEST VIRGINIA ENERGY COMPANY,

*Petitioners,*

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON,

*Respondents.*

**ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AND CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA, RESPECTIVELY**

# *AMICI CURIAE* BRIEF OF AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, WEST VIRGINIA CHAMBER OF COMMERCE, AND AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONERS

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September 22, 2008

## QUESTIONS PRESENTED

1. Whether the trial courts below erred when they held that the massive punitive damages awards in these actions – *totaling over a quarter of a billion dollars* – involving economic harms and substantial compensatory damages conformed with due process.

2. Whether the Due Process Clause of the Fourteenth Amendment requires States to provide defendants with a right to appellate review of punitive damages awards.

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* represent businesses and other entities that often find themselves targeted in civil actions seeking punitive damages. For this reason, *amici* have a substantial interest in ensuring that punitive damages are not excessive and awarded according to procedures that comport with due process. As explained below, we believe these principles were violated in the subject cases.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before this Court that have addressed punitive damages issues.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

With a 5000 member reach, the West Virginia Chamber of Commerce ("Chamber") is the recognized as the voice of business in West Virginia. In that role, it strives to encourage public policies that foster the relocation of new businesses to and the expansion of existing businesses within the state, so that all West Virginians enjoy the benefits of a robust economy. In furtherance of this goal, the Chamber has been a consistent advocate for a legal system that is predictable in its outcomes and functions within the mainstream of established jurisprudence so as to ensure that businesses in West Virginia can and do operate under the same general ground rules as their competitors elsewhere in the country.

The American Gas Association ("AGA") is the national trade association representing energy members that deliver natural gas. The AGA represents over 200 distribution companies, located in all 50 states that deliver natural gas to 64 million customers throughout the United States. AGA members include: (1) publicly traded energy utilities, municipally owned energy utilities, and privately held utility companies and (2) natural gas distributors, pipelines, marketers and storage facilities. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for members including the

filing of *amici* briefs commenting on issues that could affect its members and/or their customers.

## STATEMENT OF THE CASE

*Amici* adopt Petitioners' statements of the cases.

## SUMMARY OF ARGUMENT

The punitive damages awards in these actions – a $270 million punitive award that is the largest in the history of West Virginia and a $100 million punitive award that was the third largest upheld by West Virginia courts in 2007 – present recurring issues that merit this Court's attention.

*First*, the Petitions illustrate the difficulty some courts have had in applying the three "guideposts" this Court set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), to help provide potential defendants with "fair notice . . . of the conduct that will subject [them] to punishment [and] the severity of the penalty that a State may impose." *Id.* at 574. These Petitions present the Court with an opportunity to (1) provide needed guidance and objectivity to *Gore*'s "reprehensibility" guidepost; (2) address confusion that has arisen with respect to the application of *Gore*'s "ratio" guidepost by (a) making clear that the excessiveness inquiry must begin with an examination of whether the actual dollar amount of the award exceeds the State's legitimate interests in punishment and deterrence, and (b) squarely hold that a 1:1 ratio must provide the "fair upper limit," *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008), in cases like these that involve very large compensatory damages and questionable reprehensibility; and (3) clarify the function of the third *Gore* guidepost relating to civil

or criminal penalties that could be imposed for comparable conduct.

*Second*, these Petitions present the Court with an opportunity to clarify that due process requires at least one meaningful review of a punitive damages award by an appellate court. West Virginia is the only state that denies defendants that right in cases involving substantial punishment.

## ARGUMENT

### I. THE BACKGROUND IN WHICH THESE PETITIONS SHOULD BE CONSIDERED

For most of this nation's history, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount." D. Dorsey Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. REV. 1, 2 (1982). Punitive damages, sometimes called exemplary damages, were traditionally reserved for a narrow category of torts involving conscious and intentional harm inflicted by one person on another, such as assault and battery, false imprisonment, and trespass. *See* James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel*, 14 ST. MARY'S L.J. 351, 355 (1983); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984). Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all. *See* Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals for Reform By Courts And Legislatures*, 65 BROOK. L. REV. 1003, 1008 (2000).

Beginning in the late 1960s, however, courts began to allow punitive damages in cases that did not involve intentional misconduct, such as in product liability actions. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689 (1967) (holding for the first time that punitive damages were recoverable in a strict product liability action). The "perfect storm" created by the coupling of this dramatic expansion in the law with the advent of "mass torts" began to impact the frequency and size of punitive awards.

For example, until 1976, there were *only three* reported appellate court decisions upholding awards of punitive damages in product liability cases, and in each case the awards were relatively modest. *See Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) ($125,000 compensatory, $100,000 punitive); *Toole, supra* ($175,000 compensatory, $250,000 punitive); *Moore v. Jewel Tea Co.*, 253 N.E.2d 636 (Ill. App. 1969) ($920,000 compensatory, $10,000 punitive), *aff'd*, 263 N.E.2d 103 (Ill. 1970). Then, in the late 1970s and 1980s, the size of punitive damages awards "increased dramatically," George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982), and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface." John Calvin Jeffries, Jr., *A Comment on The Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Efficiently*, 40 ALA. L. REV. 1053, 1061 (1989) (noting a "general trend toward awarding punitive damages more frequently and in larger amounts in recent years."). One commentator observed, "Today, hardly a month goes by without a

multi-million dollar punitive damages verdict in a product liability case." Malcolm Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 ALA. L. REV. 919 (1989).

A similar expansion in the availability of punitive damages occurred in breach of contract cases. As Justice O'Connor observed in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 62 (1991) (O'Connor, J., dissenting):

> For over 200 years, recovery for breach of contact has been limited to compensatory damages. In recent years, however, a growing number of States have permitted recovery of punitive damages where a contract is breached or repudiated in bad faith. *See, e.g., Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, [686 P.2d 1158 (Cal. 1984)]. *Unheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damages awards.* (Emphasis added).

By 1991, this Court expressed concern that punitive damages had "run wild." *Haslip*, 499 U.S. 1, 18 (1991); *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) ("Recently, . . . the frequency and size of such awards have been skyrocketing" and "it appears that the upward trajectory continues unabated."). Between 1996 and 2001, the annual number of punitive damages awards exceeding $100 million doubled. *See* John Y. Gotanda, *Punitive Damages: A*

*Comparative Analysis*, 42 COLUM. J. TRANSN'L L. 391, 392 (2004).

Against this backdrop, the Court has established specific measures to guard against arbitrary and excessive punishment, recognizing that the Due Process Clause of the Fourteenth Amendment imposes both substantive and procedural safeguards in punitive damages cases. *See Haslip* (1991), *TXO* (1993); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *Gore* (1996); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2002); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

In its decisions, the Court has observed that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Oberg*, 512 U.S. at 432; *Campbell*, 538 U.S. at 417, because "defendants subjected to punitive damages in civil cases have not been accorded the protections available in a criminal proceeding." *Campbell*, 538 U.S. at 417. The Court also has recognized that punitive damages, like many forms of punishment, are by their nature, designed to "engender adverse social consequences," *Addington v. Texas*, 441 U.S. 418, 426 (1979), and may have "potentially devastating" ramifications for a defendant's character, reputation, business, and good will. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan and Marshall, J.J., concurring).[2] Most recently, in

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[2] *See also International Bhd. Of Elec. Workers v. Foust*, 442 U.S. 42, 50 (1979) ("the impact of [a punitive damages award] is unpredictable and potentially substantial"); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 417 (1967) (puni-

*Baker* (2008), the Court indicated that "runaway" punitive awards may not be "mass-produced," *id.* at 2624, but "the spread is great" and punishment continues to be imposed arbitrarily in outlier cases. 128 S. Ct. at 2625.

The subject Petitions address important punitive damages issues that merit this Court's attention. Section II of this brief discusses the need for this Court to provide additional guidance with respect to the three "guideposts" this Court set forth in *Gore*. Section III discusses the need for this Court to clarify the right of civil defendants to obtain appellate review of punitive damages awards.

## II. THIS COURT SHOULD GRANT CERTIORARI TO GIVE ADDITIONAL GUIDANCE ON THE *GORE* GUIDEPOSTS

This Court in *Haslip* (1991) acknowledged for the first time that excessive punitive damages awards could violate the Fourteenth Amendment. 499 U.S. at 18. The Court upheld the award at issue, but said that a 4-1 ratio between punitive and compensatory damages "may be close to the line" of "constitutional impropriety." *Id.* at 23-24. In *TXO* (1993), a plurality of the Court said that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" 509 U.S. at 454. The Court found that those limits had not been reached in *TXO*, but chose to note once again the *Haslip* Court's observation that a 4-1 ratio "may be close to the line of constitutional permissibility." *Id.* at 459. In *Oberg* (1994), the Court departed from

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tive damages awards have "'momentous and serious' . . . consequences" for civil defendants) (citation omitted).

substantive due process questions, but affirmed "that the Constitution imposes a substantive limit on the size of punitive damages awards." 512 U.S. at 420.

Finally, in *Gore* (1996), the Court struck down an excessive punitive award for the first time. The Court stated: "*Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.*" 517 U.S. at 574 (emphasis added). The Court then provided three "guideposts" for States to follow: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of punitive damages to the actual (or potential) harm to the plaintiff, and (3) the civil or criminal penalties that could be imposed for comparable misconduct. *See id.* at 575.

Justice Breyer observed for three concurring justices: "Requiring the application of law, rather than a decision-maker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to *assure* the *uniform general treatment* of similarly situated persons that is the essence of the law itself." *Id.* at 587 (Breyer, J., concurring) (emphasis added).

In *Cooper* (2002), 532 U.S. at 400, and *Campbell* (2003), 538 U.S. at 418, the Court reiterated the importance of the *Gore* guideposts. In *Campbell*, as in *Gore*, the Court struck down an excessive punitive award as violating due process.

*Amici* applaud the Court's leadership in helping to restore some order and fairness in punitive damages cases. The goals of "fair notice" and "uniform

general treatment" that *Gore* sought to provide have been undermined, however, by a lack of clarity as to how the three factors are to be applied. The subject Petitions provide outstanding opportunities for this Court to improve the implementation of the *Gore* guideposts.

**1. "Reprehensibility" in Contract Disputes**

*Gore* instructs courts to consider the "degree of reprehensibility of the defendant's conduct" in reasonableness determinations. 517 U.S. at 575.

As explained, a growing number of punitive damages awards arise out of contractual disputes and other alleged financial injuries. *See also* Erik K. Moller et al., *Punitive Damages in Financial Injury Verdicts*, 28 J. LEGAL STUD. 283, 284 (1999) ("[C]ases in which the injuries suffered by the plaintiff are financial in nature receive punitive damages awards much more frequently than cases in which the injuries suffered by the plaintiff are personal in nature."); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 28 (1998) ("Punitive damages play an increasingly prominent role in business . . . cases."); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 757 (2002) ("punitive damages tend to be awarded more frequently in financial injury cases."). As one commentator has summarized:

> According to RAND, in recent years 22.5% of all plaintiff verdicts (14.2% of all verdicts) have resulted in punitive damages in cases involving financial injury. *Financial torts have dominated the mar-*

> *ket for punitive damages in recent years.* According to RAND, financial torts, which made up 13% of all tort cases in America, have produced 50% of all punitive-damages verdicts. One can measure the degree to which punitive damages have dominated financial torts in other ways too: Sixty cents out of every dollar awarded in a financial-tort verdict have been for punitive damages, a far higher amount than any other tort. In fact, according to the Department of Justice study, 64% of all dollars awarded for punitive damages in 1992 were awarded in cases involving financial injury.

Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 968 (2007) (internal citations omitted) (emphasis added). This trend is especially problematic in contractual disputes, where defendants generally do not have "fair notice" that their conduct may give rise to any punishment at all, particularly when the defendant's interpretation of the contract is objectively reasonable.

This Court should remind reviewing courts that the purpose of the "reprehensibility" factor is to determine whether the conduct "was *especially* or *unusually* reprehensible enough to warrant" the amount of punishment imposed." *Id.* at 590 (Breyer, J., concurring) (emphasis in original). In most contractual disputes, this analysis should support only a modest award, if any at all. *See Safeco Inc. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2215 (2007) (actions based upon an objectively reasonable interpretation of a statute are neither willful nor reckless); *see also*

A. Mitchell Polinsky, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 939 (1998) (concluding that "courts should be cautious about awarding punitive damages for breach of contract.").

### 2. "Ratio" – Courts Should Be Reminded to Weigh Reasonableness *And* Proportionality

The second *Gore* factor focuses on the ratio of punitive to compensatory damages. The Petitions raise two related issues with respect to the application of this guidepost.

First, too many courts have lost sight of the forest for the trees. They have become so focused on applying mathematical ratios that they have forgotten that the "ratio" guidepost is intended to prevent excessive awards, not justify them. Petitioner Massey Energy's case is a textbook example.

Before courts launch into considering the ratio between punitive and compensatory awards in a particular case, they need to be admonished to take a step back and ask, "Does this award go beyond the State's interests in punishment and deterrence?" *See Gore*, 517 U.S. at 568. If the award exceeds the amount supported by those interests, either in actual dollar terms *or* by reference to a ratio, then the award must be declared unconstitutional.

Indeed, in *Campbell*, this Court said that "courts must ensure that the measure of punishment is *both reasonable and proportionate* to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. 426. Plainly, courts need to be reminded to consider both reasonableness and proportionality; they cannot rubber stamp large awards

simply because the ratio, standing alone, does not appear offensive.

Second, clearer guidance is needed with respect to the acceptable ratio to be applied in cases such as these involving very substantial compensatory awards. In *Campbell* (2003), the Court said that, "*in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process*," repeated its *Haslip, TXO, and Gore* statements that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety," and also referred to "a long legislative history . . . providing for sanctions for double, treble, or quadruple damages to deter and punish." 538 U.S. at 425 (emphasis added). The Court also explained, "*When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.*" *Id.* (emphasis added).

Most recently, in *Baker* (2008), the Court, sitting as a common law court, explained that the "real problem" with punitive damages is their "stark unpredictability," 128 S. Ct. at 2625, emphasized that "*a penalty should be reasonably predictable in its severity*," *id.* at 2627, and concluded that "*as long 'as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded . . . will be arbitrary.*" *Id.* at 2629 (emphasis added; citation omitted). The Court then settled on a 1:1 ratio of punitive damages to compensatory damages as a "fair upper limit" in maritime cases. *Id.* at 2633.

This Court should squarely hold that a 1:1 ratio provides the "fair upper limit" in cases like these that involve very large compensatory damages and questionable reprehensibility.

### 3. Courts Need to be Reminded That They Must Consider Civil or Criminal Penalties For Comparable Conduct

In a pre-*Gore* law review article and *amicus curiae* briefs to the Court, these authors suggested that punitive damages should be considered in light of criminal fines for similar conduct.[3] The third *Gore* factor instructs courts to consider the "civil or criminal penalties that could be imposed for comparable misconduct."

Unfortunately, lower courts have struggled in their attempts to apply the third *Gore* factor. Some courts have faithfully applied all three of the Court's guideposts, but "many courts have selectively applied the criteria in ways that run counter to the letter and spirit of the Court's jurisprudence." Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, But Many Courts Are Failing to Follow The Letter And Spirit of The Law*, 82 OR. L. REV. 33, -- (2003).

In particular, many courts are ignoring, giving "short shrift" to, or misapplying the third *Gore* factor. *See id.*; *see also* Brief of General Dynamics Corp. as

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[3] *See, e.g.*, Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform — State Legislatures Can And Should Meet The Challenge Issued By The Supreme Court Of The United States in* Haslip, 42 AM. U.L. REV. 1365, 1380 n.87, 1386-1391 (1993).

*Amicus Curiae* in Support of Petitioner, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035, at 3, *available at* 2000 WL 1793074 (explaining how the "vast majority of appellate courts have ignored or misapplied [*Gore's*] third Guidepost); Mark A. Klugheit, *"Where the Rubber Meets the Road": Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*. 52 SYRACUSE L. REV. 803, 834 (2002) ("The Third *BMW* factor -- existing sanctions for comparable misconduct -- seems to have been honored by lower courts as much in the breach as in the observance."). "Some have erroneously interpreted the Court's discussion of the third guidepost to preclude any comparison of punitive damages awards with criminal penalties on the ground that civil proceedings lack the protections afforded in criminal prosecutions." Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze From the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 443 (2004).

Courts must be reminded to faithfully apply *Gore* "factor three."

## III. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE APPELLATE REVIEW OF PUNITIVE DAMAGES AWARDS

This Court has repeatedly emphasized the importance of appellate review as a critical check against arbitrary, excessive, and unpredictable punitive damages awards. *See Williams*, 127 S. Ct. at 1063-64; *Campbell*, 538 U.S. at 418; *Cooper Industries*, 532 U.S. at 426; *Oberg*, 512 U.S. at 420; *Haslip*, 499 U.S. at 20. That safeguard is discretionary and often nonexistent in West Virginia, as the subject Petitions

illustrate. West Virginia is the only state in which there is no right to appellate review of a punitive damages award exceeding $350,000, even if the award is completely lawless.

As we explain below, West Virginia's system (1) violates this Court's due process holdings, (2) is far outside the legal mainstream, and (3) creates a substantial risk that civil defendants will either face excessive punishment in West Virginia or be forced to turn to this Court to uphold due process limits in many instances. This Court should grant certiorari and hold that due process requires at least one meaningful review of a punitive damages award by an appellate court.

In *Haslip*, where this Court upheld a punitive award as consistent with due process, the Court stressed the availability of both "meaningful and adequate review by the trial court" and subsequent appellate review. 499 U.S. at 20. The Court explained, "By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion," and said that "[t]his appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose." 499 U.S. at 20-21. In *TXO*, the plurality found that the fact that the award was unanimously affirmed on appeal gave rise to a "strong presumption of validity." 509 U.S. at 457.

In subsequent cases the Court again emphasized the importance of appellate review to the due process analysis. In *Oberg*, the Court explained that "[j]udicial review of the size of punitive damages has been a safeguard against excessive verdicts for as

long as punitive damages have been awarded." 512 U.S. at 421. The Court held that Oregon's denial of judicial review of the size of punitive damages awards violated due process. *See id.* at 432. *Oberg* has been interpreted to stand for the proposition that "appellate review of punitive damage awards [is] required." Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation*, 79 NOTRE DAME L. REV. 2025, 2027 (2004).

In *Cooper*, the Court held that federal appellate court review of punitive damages must be *de novo*. 532 U.S. at 443; *see also* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1069-70 (2004) ("state appellate courts, too, must exercise de novo review over whether punitive damages are excessive.").

More recently, this Court confirmed that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *State Farm*, 538 U.S. at 418 (citation omitted). If appellate review of punitive damages must be *de novo* and "[e]xacting," then certainly due process is violated when a state completely denies a defendant of any right to appellate review of a substantial punitive award.

The *Oberg* Court's due process methodology provides additional support for holding that West Virginia's system violates due process. In *Oberg*, the Court looked to modern and traditional procedures as a benchmark. 512 U.S. at 426, 435.

The modern practice in forty-eight states, the District of Columbia, and the federal court system, is to

give punitive damages defendants at least one appeal as of right. West Virginia and its "mother state," Virginia, are the only two states that do not afford such a right. Virginia, however, protects against substantial punishment by capping punitive damages at $350,000, *see* VA. CODE § 8.01-38.1, and the Virginia Supreme Court considers the refusal of a petition for appeal to be "a decision on the merits." *Sheets v. Castle*, 559 S.E.2d 616, 619 (Va. 2002). West Virginia, therefore, is the only state which denies a right to appellate review on the merits to defendants facing a substantial punitive damages judgment. Moreover, as Petitioners explain, the right to appellate review finds additional support in the common law. *See, e.g., Oberg*, 512 U.S. at 421.[4]

The need for appellate review in West Virginia is heightened by the State's notorious reputation for treating civil defendants unfairly, particular large out-of-state corporations. West Virginia has the dubious distinction of being named the only statewide "Judicial Hellhole" by ATRA for several years running.[5] A recent survey of in-house legal counsel conducted by the U.S. Chamber of Commerce's Institute

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[4] This Court has said in *dicta* that states are not constitutionally required to provide appellate review of criminal convictions. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751 (1983). *Amici* agree with Petitioners that those statements should not prevent appellate review of punitive damages awards as a matter of right. There is a historical distinction to be drawn. In addition, criminal defendants have the benefit of substantial additional safeguards, including a higher burden of proof, maximum sentences, and federal habeas corpus.

[5] *See* American Tort Reform Foundation, *Judicial Hellholes* 11-14 (2007), http://www.atra.org/reports/hellholes/report.pdf.

for Legal Reform ranked West Virginia as having the nation's worst legal climate.[6]

In 2007, West Virginia was home to three of the seven largest punitive awards in the nation, including the two subject Petitions with punitive damages together approaching *$400 million*.[7] In the third case, which involves nearly $200 million in punitive damages, West Virginia's Governor has taken the extraordinary step of asking the West Virginia Supreme Court of Appeals to provide meaningful review of punitive damages awards. *See Amicus Curiae* Br. of Joe Manchin, III, Governor of the State of West Virginia, *E.I. du Pont de Nemours & Co. v. Perrine*, No. 080721 (W.Va. June 24, 2008). Together, these three verdicts – totaling *over* a *half a billion dollars in punitive damages* - demonstrate the high risk in West Virginia that an excessive verdict resulting from a lack of procedural safeguards may face absolutely no appellate scrutiny unless this Court holds that such review is required.

The practice of West Virginia trial courts to order reverse bifurcation of punitive damages trials – which the West Virginia courts view as "creative, innovative" trial management, *see In re Tobacco Litig.*, 624 S.E.2d 738, 739 n.1 (W. Va. 2005) – adds to the likelihood that civil defendants will be subject to arbitrary and excessive punishment in the State. *See*

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[6] *See* U.S. Chamber of Commerce Institute of Legal Reform, *Lawsuit Climate 2008: Ranking the States*, http://www.instituteforlegalreform.com/issues/tools/ppt/LawsuitAbuseFactFacts2008.ppt.

[7] *See* Verdict Search, *Top Verdicts of 2007*, http://www.verdictsearch.com/index.jsp?do=top100.

Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a "Reverse Bifurcation" Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375 (2008).

This Court should clarify that due process requires affording punitive damages defendants a right to at least one meaningful appellate review. If this Court fails to do so, civil defendants in West Virginia punitive damages cases will have no choice other than to continue to turn to this Court for relief.

## CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the subject Petitions for Writs of Certiorari.

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# In the Supreme Court of the United States

CENTRAL WEST VIRGINIA ENERGY COMPANY AND MASSEY ENERGY COMPANY,

*Petitioners,*

v.

WHEELING PITTSBURGH STEEL CORPORATION, ET AL.,

*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia**

## BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires States to afford litigants at least one appeal as of right to review judgments awarding substantial compensatory and/or punitive damages.

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## INTEREST OF THE *AMICI CURIAE*

*Amici Curiae* are Joan Steinman, Distinguished Professor of Law at Chicago-Kent College of Law, and Margaret Stewart, Professor of Law at Chicago-Kent College of Law.[1] *Amici* write and teach in the areas of civil procedure, complex litigation, constitutional law, appellate courts and federal courts. *Amici* file solely as individuals and not on behalf of any institutions with which they are affiliated.

## STATEMENT

This case presents an ideal vehicle to address the due process problems created by West Virginia's failure to provide an appeal of right following legally indefensible civil damages awards. West Virginia's system is more than a modern anomaly -- it is a historical abnormality that fails to comport with longstanding notions of procedural due process. Appellate review of civil judgments as a matter of right has been a venerable component of the English and American legal traditions. This Court should recognize that such an appeal is guaranteed by the Due Process Clause of the Fourteenth Amendment.

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[1] Neither of the parties has participated in the drafting of this brief. No person other than *amici* made a monetary contribution to the preparation or submission of this brief. Respondents consented to the filing of this brief by letter dated September 12, 2008, a copy of which has been filed with the Clerk of this Court.

## ARGUMENT

### I. THE RIGHT TO APPEAL A SUBSTANTIAL CIVIL DAMAGES AWARD IS HISTORICALLY WELL-GROUNDED.

For hundreds of years, the right to appeal civil judgments affecting substantial property interests has been a bedrock principle of the English and American legal systems. As Judge Coffin recognized, "[t]he opportunity to take one's case to 'a higher court' as a matter of right is one of the foundation stones of both our state and federal court systems." Frank M. Coffin, *The Ways of a Judge* 16 (1980). This traditional safeguard against unjustified deprivations of property in civil cases was well known to the drafters of the Fourteenth Amendment's Due Process Clause.

Appeals of right for all civil judgments were a procedural guarantee that American courts adopted from England, where "writs of error were available as a matter of right in civil cases." 3 W. Blackstone, *Commentaries on the Law of England* 406-11; *see also* 2 William Tidd, *The Practice of the Court of King's Bench*, in *Personal Actions* 72, 151 (Issac Riley, ed.) (1807) (in the King's Bench, a writ of error "lies of course" to review common law judgments); Coffin, *Ways of a Judge* at 33 (discussing the "English model of review" for all civil judgments, characterized by the right to "broad and unrestricted appeal to the Court of Quarter Sessions").

States incorporated the right to appeal civil judgments into their courts from early colonial times. As early as 1620, Virginia guaranteed that "[i]f any man find himself aggrieved by a lesser or ordinary

Court, he may appeal to a great and Quarter-Court, where the matter *shall be heard* and finally ordered." Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 Hastings L.J. 913, 945 (1997) (quoting 3 Peter Force, *Tracts and Other Papers Relating Principally to the Origin, Settlement and Progress of the Colonies in North America* (1947)) (emphasis added). By the 1640s, the right to appeal had become "a central component in the legal system of Massachusetts Bay and Rhode Island." Bilder, 48 Hastings L.J. at 943. Likewise, in New Jersey appellate review always was available for substantial deprivations of property, including "misdemeanor cases where a fine exceeding a certain amount was imposed as a sentence." David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. Crim. L. & Criminology 518, 537 (1990) (citing Lord Cornbury's Charter of 1702, New Jersey ("You are also to permit Appeals to us in Council, all Cases of Fines imposed for Misdemeanours; provided the Fines so imposed, amount to or exceed the value of two Hundred Pounds, the Appellant first giving good Security")). Accordingly "the colonists came to view wide-ranging, easily accessible appeal as something to which all had a right." Coffin, *Ways of a Judge* at 33.

This tradition of guaranteed appellate review continued into early Federal and State court systems. Through "the late eighteenth century * * * appeals from proceedings in equity and admiralty, and writs of error to secure review of judgments at common law, were available to appellants and petitioners in error as a matter of right." James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L. Rev.

1515, 1570 (2001). New York provided that "writs of error in all civil cases * * * shall be considered as writs of right and issue of course." Act of March 20, 1908 (1 N.Y. Rev. Laws 2000) (quoted in Rossman, 81 J. Crim. L. & Criminology at 541 n.110); *see also* William Wyche, *A Treatise on the Practice of the Supreme Court of Judicature of the State of New-York in Civil Actions* 272 (2d Ed. 1794) (noting that the "writ of error is a writ demandable of right in all civil cases"). In Connecticut, the writ of error was "a matter of right [to be] granted in all criminal cases, in the same manner as in civil cases." Z. Swift, *A Digest of the Laws of the State of Connecticut* 418 (1823) (quoted in Rossman, 81 J. Crim. L. & Criminology at 541 n.107). In Virginia, the writ of error for common law judgments remained "available by right, and the only requirement was that the defendant certify probable cause of an error existed." Rossman, 81 J. Crim. L. & Criminology at 542.

This long pedigree illustrates that West Virginia's peculiar judicial system -- the only system denying an appeal of right for substantial punitive damages awards -- is a "departure from traditional procedures," *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 421 (1994), resulting in "a dramatic difference between the judicial review of punitive damages awards under the common law" (*id.* at 426) and in West Virginia. Likewise, West Virginia's "abrogation of a well-established common-law protection against arbitrary deprivations of property" (*id.* at 430) and its disregard for "traditional practice" -- the "touchstone for constitutional analysis" of procedural due process (*ibid.*) -- suggests that West Virginia's appellate system fails to comport with the Fourteenth Amendment's Due Process Clause.

## II. HISTORICAL DISTINCTIONS BETWEEN APPEALS FOLLOWING CIVIL JUDGMENTS AND CRIMINAL JUDGMENTS NEED NOT BE ABANDONED.

If this Court holds that the Due Process Clause guarantees an appeal of right following some or all civil judgments, this Court would not be *required* as a consequence to recognize a similar constitutional right to appeal criminal judgments. (Of course, the Court would not be precluded from so ruling in the criminal context.) Historically, appellate review has been guaranteed uniformly for civil judgments, but not criminal, judgments. Criminal defendants now enjoy, and throughout Anglo-American legal history have enjoyed, numerous procedural protections not guaranteed to civil litigants; consequently, state courts held that criminal defendants were not constitutionally entitled to an appeal directly following a conviction. In *Bedinger v. Commonwealth*, 7 Va. (3 Call) 461 (1803), the Virginia Supreme Court articulated the logic of this disparate appellate treatment for criminal and civil judgments:

> The tenderness and leaning of our code in favour of the criminal, the uncontroulable power of the jury to acquit in a criminal case, the pardoning power of the executive, and the objection to great delays in the execution of the criminal law, fully justify [the policy of not permitting an appeal in criminal cases].

*Id.* at 469 (opinion of Roane, J.). New York courts echoed these same sentiments:

> Nor is there any danger that innocence will suffer for want of a writ of error. Criminal pro-

> ceedings have thrown around the innocent so many guards, that the writ of error is almost useless. * * * If there be the least irregularity in the proceedings, the court must either grant a new trial, or recommend the party to a pardon.

*Lavett v. People*, 7 Cow. 339, 343 (N.Y. 1827); *see also ibid.* (justifying the different appellate treatment of criminal and civil errors based on procedures uniquely available to criminal defendants, including the requirement of proof beyond a reasonable doubt, the requirement of unanimity by the jury, the necessity of indictment by a grand jury, the right to a public trial and public examination of witnesses, and the right to counsel).

This traditionally disparate treatment of civil and criminal appeals is also evidenced by the federal courts. For many years, and through the ratification of the Fourteenth Amendment's Due Process Clause, the federal judicial system afforded a uniform right to appeal for civil litigants, but not for criminal defendants. *See* William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U.L. Rev. 1, 6 (1986) (noting that "before 1889 there had been for practical purposes no appeal whatever to any court from judgment of conviction in federal criminal cases," despite the fact that the Supreme Court had been "at the disposal of *every* losing [civil] litigant in a federal court who had the time and money to take an appeal") (emphasis added).

The historical discrepancy between the availability of appeals in criminal and in civil cases, grounded in trial-level procedural disparities still present today, permits a disparate treatment of civil appellate

procedure and criminal appellate procedure under the Due Process Clause. As a pragmatic matter, drawing distinctions between these types of judgments is defensible; criminal trials still are marked by procedural safeguards (proof beyond a reasonable doubt being the most significant) absent in civil litigation. By contrast, guaranteed access to post-judgment review is procedurally necessary to guard against unjustified deprivations of property in civil cases.

## III. PUBLIC POLICY SUPPORTS AN APPEAL OF RIGHT FOLLOWING SUBSTANTIAL CIVIL DAMAGES AWARDS.

The same policy considerations that historically supported the right to appeal civil judgments continue to apply in modern litigation.

*First*, civil damages awards must be determined through the application of a uniform set of baseline procedural guarantees. The concern for uniformity motivated historical guarantees of appeals for such awards. *See, e.g.*, Rossman, 81 J. Crim. L. & Criminology at 549 ("Review [by appellate courts] provided a means for ensuring the uniform application of the law."). That same concern with baseline procedural uniformity, articulated repeatedly by this Court in recent punitive damages decisions, counsels in favor of a constitutional right to appellate access in cases involving substantial civil damages awards.

*Second*, notions of fundamental fairness have long counseled in favor of guaranteed appellate access for civil litigants. As the framers of the Constitution recognized, the absence of a guaranteed appeal in cases involving substantial deprivations of

property would undermine confidence in the judicial system; "were there no appeal [guaranteed for civil judgments], every man would have reason to complain, *especially when a final judgment, in an inferior court, should affect property to a large amount.*" Pamphlet of Noah Webster, addressed to Benjamin Franklin, on the proposed Constitution, October 10, 1787, in *Pamphlets on the Constitution of the United States* 53 (P. Ford ed. 1888) (reprinted 1968) (emphasis added). Indeed, from colonial times, appeals have been guaranteed in large part as a reaction to "the excesses to which litigiousness and a passion for juries could lead." Coffin, *Ways of a Judge* at 34. Those excesses, and a passion for trial by jury (particularly in West Virginia), are exemplified by this case. They are nothing new. The English and American legal traditions have addressed them through an appeal of right. West Virginia's unique failure to do so violates the guarantee of procedural due process.

*Third*, the burdens imposed by very heavy caseloads and the complexity of much contemporary litigation result in unprecedented opportunities for error by even the best qualified and wholly impartial trial judges. Both the number of rulings that trial judges must make, and the difficulty of the decisions that they must reach -- in terms of the multifacetedness of the facts they must consider, the complexity of the legal issues they must resolve, and the delicacy of the discretionary choices they must make -- substantially increase the risk of error from what it often was, historically. At the same time, the magnitude of verdicts today is such that the consequences of error may be devastating for litigants, and seriously damaging for others who depend upon and interact with them. These conditions of modern

litigation have rendered it imperative that litigants be given a guaranteed opportunity to have an impartial court of appeals review both the ultimate decision in their case and the underlying rulings that merged into that final judgment. Almost all States recognize this and afford statutory or state constitutional rights to appeal in civil cases involving substantial damages awards. When a state does not voluntarily afford such a guaranteed right, but makes the right to appeal subject to the unreviewable discretion of its courts, the Due Process Clause must be held to require the state to permit a meaningful appeal.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Nos. 08-217 & 08-218

IN THE

# Supreme Court of the United States

MASSEY ENERGY COMPANY, *ET AL.*,
*Petitioners,*

v.

WHEELING PITTSBURGH STEEL CORP., *ET AL.*,
*Respondents.*

**On Petitions for Writs of Certiorari to the Supreme Court of Appeals of West Virginia and the Circuit Court of Brooke County, West Virginia**

## BRIEF AMICUS CURIAE OF THE NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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IN THE

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MASSEY ENERGY COMPANY, *ET AL.*,

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**On Petitions for Writs of Certiorari to the Supreme Court of Appeals of West Virginia and the Circuit Court of Brooke County, West Virginia**

## BRIEF AMICUS CURIAE OF THE NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

## STATEMENT OF INTEREST OF AMICUS CURIAE [1]

[1] Pursuant to this Court's Rule 37.2(a), *amicus* states that counsel of record for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief. The parties have consented to the filing of this brief; copies of the consent letters have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* further notes that no counsel for a party authored this brief in whole or in part, and no counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The National Mining Association ("NMA") is a national trade association that represents all aspects of the mining industry, including producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral-processing machinery and supplies; bulk transporters; financial and engineering firms; and other businesses related to mining. The mining industry produces vital resources needed to fuel our economy and manufacture virtually all commodities sold in domestic and foreign markets. In 2005, the U.S. mining industry produced $78.4 billion of finished mineral, metal, and fuel products. These products were in turn used to create an additional $2 trillion worth of consumer and industrial goods. *See The Economic Contributions of the Mining Industry in 2005*, at 3 (2007).

The NMA works with Congress and regulatory officials to promote practices that foster the environmentally sound development and use of mineral resources. It also participates in litigation raising issues of concern to the mining community, *see, e.g.*, *National Mining Ass'n* v. *Fowler*, 324 F.3d 752 (D.C. Cir. 2003), and has been involved in cases, like this one, in which the Court is asked to review and decide nationally significant issues relating to due process and remedies. *See, e.g.*, *El Paso Nat. Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999) (relating to jurisdiction and remedies issues).

The NMA has a substantial interest in this case because many of its members have significant interests in the states of West Virginia and Virginia. West Virginia ranks second nationally in the production of coal, with over 161 million short tons pro-

duced in 2007.[2] Virginia's coal production exceeded 29 million short tons in 2007. And West Virginia and Virginia are the only two states in the Nation that do not afford an appeal as of right of punitive damages awards.

## SUMMARY OF ARGUMENT

This Court for many years has found it necessary to admonish courts that they must provide "meaningful and adequate" review of punitive damage awards. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 20-21 (1991). The Court has explained, among other things, that a punitive damages award should be "reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 15; *see also Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 420-421 (1994); *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 471 (1993) (Scalia, J., concurring) (noting that "'procedural due process' requires judicial review of punitive damages awards for reasonableness"). But reviewing an award for reasonableness begs the next question: reasonable as to what? As this Court observed just last Term, punitive awards must not only be reasonable in relation to compensatory awards; they must be reasonable in relation to *each other*, and in this respect punitive damages awards demonstrably often are not. *Exxon Shipping Co.* v. *Baker*, ___ U.S. ___, 128 S. Ct. 2605, 2625-27 (2008).

This Court does not sit to monitor on a case-by-case basis what it recently described as the "stark unpre-

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[2] A "short ton" is a unit of mass equal to 2,000 pounds; it is distinguished from the metric ton (1,000 kilograms) and the "long ton" (2,240 pounds).

dictability" of such awards. *Exxon*, 128 S. Ct. at 2625. Rather, it grants review where it determines that there is a broad and compelling interest in having the Court decide the issue presented therein. *See* S. Ct. Rule 10.

The federal and state appellate courts, on the other hand, are where errors in the trial process are *supposed* to be corrected. *Cf. Greenlaw* v. *United States*, ___ U.S. ___, 128 S. Ct. 2559, 2571 (2008) (Alito, J., dissenting) (urging the Court to "entrust the decision to initiate error correction to the sound discretion of the courts of appeals"). And where punitive damage awards are concerned, courts of appeals regularly find themselves in an error-correcting role. Punitive damages awards are modified or vacated in a *substantial* percentage of cases. Appellate review of damages awards furthers what this Court identified in *Exxon* as the goal that penalties be "reasonably predictable in [their] severity." 128 S. Ct. at 2627. That goal—predictability of outcomes—is a fundamental tenet of due process. It is achieved when appellate courts rigorously review jury awards. But rigorous appellate inquiry is nowhere to be found in West Virginia, whose unique judicial system couples discretionary appellate review with a notorious tolerance for colossal punitive damages awards. The petitions should be granted.

## REASONS FOR GRANTING THE WRIT

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## APPELLATE REVIEW MATTERS.

### A. Appellate Courts Vacate Or Modify Punitive Damages Awards In A Substantial Percentage Of Cases.

It is the purpose of the Due Process Clause to ensure "the fair and orderly administration of the laws." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). One fundamental element of the law's "orderly administration," embedded in countless legal doctrines, is predictability: it is a central goal of the law that individuals and entities be able to understand the legal consequences of their conduct by reference to clear rules and the application of those rules to similar facts. As this Court explained years ago in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980), predictability in the legal system (in that case, notice of what conduct would and would not trigger personal jurisdiction over the person in state court) "allows potential defendants to structure their primary conduct with some minimum assurance" of the legal consequences of their actions. *See also Koon* v. *United States*, 518 U.S. 81, 113 (1996) (noting in the criminal context the need to "reduce unjustified disparities" in sentencing, "and so reach toward the even-handedness and neutrality that are the distinguishing marks of any principled system of justice").

In the same vein, just last Term in *Exxon Shipping Co.* v. *Baker*, ___ U.S. ___, 128 S. Ct. at 2625, this Court voiced dismay at what it called the "stark unpredictability of punitive awards." As it ex-

plained, data purporting to show a low "median ratio of punitive to compensatory awards" and empirical evidence that "punitive awards are infrequent" shed no light on the critical question of *consistency* across awards, *i.e.*, "whether the spread between high and low individual awards is acceptable. The available data suggest it is not." *Id.* After citing some of that data, the Court observed that fluctuations in punitive awards

> might be acceptable or even desirable if they resulted from judges' and juries' refining their judgments to reach a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances, while producing fairly consistent results in cases with similar facts. But anecdotal evidence suggests that nothing of the sort is going on. * * * We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances. [*Id.* at 2625-26.][3]

This demonstrable lack of consistency across punitive damage awards for similar conduct mars the judicial system. Awards wholly out of scale with those approved in similar circumstances cast an "implication of unfairness" on the proceedings, to the

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[3] The Court also pointed to the Alabama Supreme Court's later-reversed decision in *BMW of North America, Inc.* v. *Gore*, in which the state court, confronted with two wildly different punitive damages verdicts (one $0 and one $4 million) in "strikingly similar" circumstances dismissively explained that the gross disparity between the two awards was merely " 'a reflection of the inherent uncertainty of the trial process.' " *Id.* at 2626 (citing and quoting *BMW of N. Am., Inc.* v. *Gore*, 646 So.2d 619, 626 (1994), *rev'd*, 517 U.S. 559 (1996)).

serious detriment of a system "whose commonly held notion of law rests on a sense of fairness in dealing with one another." *Id.* at 2627. Justice Holmes's hypothetical "bad man" and his counterparts all should face penalty schemes that produce "a fair probability of suffering in like degree when they wreak like damage." *Id.*

There are, of course, a few examples from this Court where large punitive damages awards are reduced after merits briefing and argument—the latest being *Exxon* itself. *See id.* at 2634 (vacating $2.5 billion judgment and remanding for court of appeals to remit punitive damages to $500 million, representing a 1:1 ratio of punitive to compensatory damages). *See also State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996).

But as these very few decisions show, this Court's charge is not to sit as a court of error correction; the Court "rarely" grants certiorari "where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10. This Court takes up cases to articulate or explicate a legal rule; trial courts and courts of appeals apply those rules to each case's facts and circumstances. It accordingly falls to the lower appellate courts—which because they review multiple trial courts' rulings have the necessary vantage point for such work—to impose the "consistency" and "predictability" across damages awards this Court identified as a valued aspect of the judicial system. *See Exxon*, 128 S. Ct. at 2626 & n.17; *Honda Motor Co.*, 512 U.S. at 421 ("Judicial review of the size of punitive damages awards has been a safeguard

against excessive verdicts for as long as punitive damages has been awarded") (citing cases dating back to 1763); *see also Ornelas* v. *United States*, 517 U.S. 690, 697 (1996) (noting that "legal rules * * * acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles.")

The "safeguard against excessive verdicts," *Honda Motor Co.*, 512 U.S. at 421, is often invoked and rigorously enforced at the appellate level—at least, by courts of appeals in 48 states and the District of Columbia. This Court observed as much in *Honda*, noting that "the most exhaustive study of punitive damages establishes that over half of punitive damages awards were appealed, and that more than half of those appealed resulted in reductions or reversals of the punitive damages." *Id.* at 433 n.11 (citing Michael L. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 57 (1992)).[4] As

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[4] *See also, e.g.*, William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, Regulation, Sept.–Oct. 1986, at 33 (noting that in a 1986 sample of federal product-liability cases, federal appellate courts reversed or remitted punitive awards in 7 of 10 cases); Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 Just. Sys. J. 349, 353 (1986) (studying 198 high-dollar awards and finding that the jury award remained unmodified in only slightly more than one-quarter of cases); Mark Peterson, Syam Sarma & Michael Shanley, Inst. for Civ. Justice, R–3311–ICJ, *Punitive Damages: Empirical Findings* 30 (1987) (reporting findings that "most large punitive damages awards were reduced by post-trial activity"— based upon a survey of attorneys of record in 129 trials conducted between 1979 and 1983).

the same commentator the *Honda* Court cited approvingly noted several years later, in the years following *BMW*, the federal courts of appeals vacated or remitted punitive damages awards in eight out of eleven cases reviewed. *See* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisc. L. Rev. 1, 14 (1998).[5]

When the courts of appeals take up and (often) reverse, reduce, or modify punitive damages awards, they naturally look to this Court for guidance on the parameters to apply to test the awards' reasonableness.[6] But when it comes to putting those constitu-

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[5] More recent studies similarly conclude that jury punitive damages awards are more often than not reduced by trial or appellate courts on post-verdict review. *See, e.g.*, U.S. Dep't of Justice, Bureau of Justice Statistics, *Punitive Damage Awards in Large Counties*, 2001 (March 2005) (noting that over half of punitive damage awards were modified after verdict); Michael L. Rustad, *The Closing of Punitive Damages' Iron Case*, 38 Loy. L.A. L. Rev. 1297, 1329-34 (2005) (examining state-court review of the excessiveness of punitive damage awards); *see also* Tamara Loomis, *Punitive Damages; Practical Impact of High Court Decision Is Disputed*, 225 N.Y.L.J. 5 (2001) (reporting that of 29 high-dollar punitive damages verdicts in 1994, ten were reversed and another ten were severely reduced).

[6] Courts of appeals also regularly reverse outright punitive damages awards because of fundamental legal, evidentiary, or instructional deficiencies in the trial process. *See, e.g.*, *White* v. *Ford Motor Co.*, 500 F.3d 963, 972 (9th Cir. 2007) (reversing and remanding for new trial on punitive damages because of instructional error); *Exxon Mobil Corp.* v. *Alabama Dep't of Conservation & Nat. Res.*, 986 So. 2d 1093, 1117-18 (Ala. 2007) (reversing $3.5 billion punitive damages award on the ground that no fraud had been proven); *Ciba-Geigy, Inc.* v. *Murphree*, 653 So.2d 857, 867 (Miss. 1994) (reversing $500,000 punitive damages award on ground that "[t]here is nothing alleged that could lead to" the imposition of punitive damages). The appellate courts' function thus is not just to ensure regularity across

tional parameters to practice and determining whether a particular award is "reasonable" in the circumstances, appellate courts look to other cases presenting similar circumstances in order to further predictability and consistency across outcomes. *See Exxon*, 128 S. Ct. at 2625-26.

In *JCB, Inc.* v. *Union Planters Bank, NA*, ___ F.3d ___, 2008 WL 3897384 (8th Cir. Aug. 26, 2008), for example, a jury awarded over a million dollars in punitive damages on a single trespass claim resulting from a repossession, and the district court refused to modify or remit the award. Examining, among other things, other cases comparable to the claim on review, the court of appeals concluded that the punitive award on the trespass claim was "beyond what due process will permit." *Id.*, 2008 WL 3897384, at *10. As it explained, the highest punitive damages award it could find "in a comparable Missouri case" was substantially lower than the jury's million-dollar award, and the award in the comparator case was rendered on claims that covered both trespass and conversion. *Id.* (citing *Perkins* v. *Dean Mach. Co.*, 211 S.W.3d 148 (Mo. Ct. App. 2007)). The Eighth Circuit ultimately cut back the jury's punitive damages award to one-tenth the original amount. *Id.*

In *Bridgeport Music, Inc.* v. *Justin Combs Publishing*, 507 F.3d 470 (6th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3630 (U.S. May 19, 2008) (No. 07-1438), a jury had found the defendants liable for copyright infringement after they released a song

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verdicts; it is to ensure that the verdicts were justly rendered in the first place.

containing an unlicensed sample. The jury awarded a total of $3.5 million dollars in punitive damages, and the district court declined to modify or remit the punitives award. *Id.* at 477-478. On appeal, the Sixth Circuit concluded that the punitive award was unconstitutionally excessive: defendants' copyright violations were "not so reprehensible as to justify" an award of that magnitude, the plaintiff was not financially vulnerable, and there was no evidence that the infringing action was part of a pattern of misconduct.[7] *Id.* at 487-488.

The court reached that conclusion by reference to, among other things, earlier decisions of its own and from other circuits. The court of appeals explained that it previously had held in a case also presenting only one "reprehensibility factor[ ]" that a 2:1 or 1:1 ratio of punitives-to-compensatory damages was permissible. *Id.* (citing *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 601, 613-614 (6th Cir. 2006)). And the court had held in another appeal that a 1:1 ratio of punitives to compensatories was appropriate where only one "reprehensibility factor" was present. *Id.* at 488 (citing *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 154-156 (6th Cir. 2007)).

The court of appeals also looked outside its own jurisdiction to the Eighth Circuit, which similarly had concluded that a 1:1 ratio "was appropriate where the compensatory damages award was large and the defendant's conduct was more reprehensible

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[7] The court of appeals also concluded that the jury mistakenly had included compounded prejudgment interest in its compensatory damages award—a mistake the district court also had failed to correct. *Id.* at 484-485.

than in this case." *Id.* (citing *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 792-793 (8th Cir. 2004)).

The Sixth Circuit engaged in a similar inquiry when it came time to assess the ratio between compensatory and punitive damages in the case: after acknowledging this Court's instruction on the issue, *id.* (citing, inter alia, *State Farm*, 538 U.S. at 425), the court of appeals again returned to its prior precedents and determined that the ratio of awards in the case was intolerably high. *Id.* at 488-489 (citing *Bach*, 486 F.3d at 156-157, and *Pollard* v. *E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 666-668 (6th Cir. 2005)). *See also, e.g.*, *DiSorbo* v. *Hoy*, 343 F.3d 172, 188 (2d Cir. 2003) (reducing punitive damages award in police-misconduct case after "assess[ing] such awards in other police misconduct cases"); *Kimzey* v. *Wal-Mart Stores, Inc.*, 107 F.3d 568, 577 (8th Cir. 1997) (reducing $5,000,000 award to $350,000 after "considering awards in similar cases"); *Lee* v. *Edwards*, 101 F.3d 805, 812 (2d Cir. 1996) (remitting $200,000 punitives award to $75,000 after "examin[ing] punitive damage awards in similar cases"); *Continental Trend Res., Inc.* v. *Oxy USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996) (examining awards from other states to conclude that defendant was sufficiently on notice of the possibility of a large punitive award, but remitting the jury's $30,000,000 award to $6 million).

State appellate decisions are the same. In *Burlington Northern Railroad Co.* v. *Whitt*, 575 So.2d 1011 (Ala. 1990), for example, a railroad challenged as unconstitutionally excessive a $15 million punitive damages jury award that the trial court on post-trial motions had refused to reduce. The Alabama Su-

preme Court remitted the award to $5 million after "having compared verdicts in similar cases that have come to this Court." *Id.* at 1024. The court observed that it was the "only appellate court with the ability to assure some degree of uniformity in the area of punitive awards," and it thus fell to that court to "determine whether the award is excessive when compared to awards in similar cases." *Id.*

The Supreme Court of Illinois embraced the same approach in *International Union of Operating Engineers, Local 150* v. *Lowe Excavating Co.*, 870 N.E.2d 303, 322 (Ill. 2006), when it took up a defendant's appeal of a $325,000 punitive damages award in a union lawsuit. "In our estimation," the court explained, "the best way to determine whether a given ratio is appropriate is to compare it to punitive damages awards in other, similar cases." The plaintiffs in that case had cited several earlier decisions in support of the substantial punitive damages verdict there; but the Supreme Court found those cases distinguishable in kind and degree. *Id.* at 322. After identifying other, more factually similar cases that "provide[d] some guidance on the issue," the court concluded that the $325,000 award was far in excess of that awarded in similar cases, and that a $50,000 award was reasonable. *Id.* at 323-324. *See also Gehrett* v. *Chrysler Corp.*, 882 N.E.2d 1102, 1120-22 (Ill. App. Ct. 2008) (thoroughly reviewing cases from Illinois, the Seventh Circuit, and other courts of appeals that previously had addressed punitive damages in similar factual contexts and ultimately directing a substantial remittitur of punitives).

*JCB*, *Bridgeport*, *Burlington Northern*, *Lowe*, and other appellate decisions like them demonstrate the

utility—indeed, the necessity—of appellate review of punitive damage awards to maintain some degree of consistency and predictability across the judicial system. Federal and state appellate courts take direction from this Court on the constitutional boundaries of a punitive damages award. They apply those teachings—and ensure some degree of consistency among awards in similar cases—by seeking guidance in turn from other cases in their own or other appellate courts presenting similar fact patterns. A jury in an individual case, of course, is not privy to that systemwide knowledge. And busy trial courts reviewing jury verdicts may or may not be fully apprised of the range of verdicts upheld (or not) in similar circumstances in their home or a sister state. It falls to the appellate courts in their oversight role to ensure that the orderly administration of justice produces reasonably predictable outcomes in high-dollar cases. And in West Virginia, that oversight is for all practical purposes nonexistent.

### B. The Supreme Court Of West Virginia's System Of Discretionary Review Fails To Provide Sufficient Meaningful Appellate Review Of Punitive Damages Awards.

The Supreme Court of West Virginia's "appellate jurisdiction is entirely discretionary. It may either grant or refuse review of any case." Supreme Court of West Virginia website, *available at* http://www.state.wv.us/wvsca/Supreme.htm (last accessed Sept. 19, 2008). Review is refused far more often than it is granted; the most recent statistics available from that court show that its overall petition grant rate is eleven percent. *See* West Virginia Supreme Court of

Appeals 2006 Annual Report, *available at* http://www.state.wv.us/wvsca/2006 Stats.pdf.

Despite the relative stinginess of its grants, the Supreme Court's role includes that of being a court of error: its rules direct petitioning parties to enumerate the "assignments of error relied upon on appeal," W. Va. S. Ct. R. 3(c)(4), and further review will be denied if the Court in its limited inquiry at the petition stage concludes that the trial court's decision was "plainly right." *Id.* R. 7(a). But the West Virginia Supreme Court's eleven-percent grant rate pales in comparison to the proven *error* rate of punitive damages awards; study after study has demonstrated that courts reviewing punitive damages awards modify or overturn those awards over half the time. *See supra* at 8-9.

Unless West Virginia's trial-court decisions are orders of magnitude more accurate than those rendered by its sister-state courts, therefore, errors are left unremedied at the West Virginia Supreme Court. The result: some of the largest punitive damages awards in the Nation are left unexamined by any appellate court for their reasonableness in relation to other awards rendered in like circumstances. This is not due process; it is a lottery. The Alabama Supreme Court in *Gore* chalked up gross disparities among verdicts in that state to the inherent "uncertainty" of the trial system—an assertion this Court made short work of on merits review. This Court similarly should grant review of these petitions, conclude that due process requires more than West Virginia gives, and reverse.

## CONCLUSION

For the foregoing reasons, and those in the petitions, the petitions for writs of certiorari should be granted.

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